SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA
J.D. Candidate, May 2022
Honors: Dean's Prize, awarded to students obtaining the highest grades in the 1L year
University of Pennsylvania Law Review, Senior Editor
Asian Law Review, Associate Editor
Credited for research in Stephen Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 L. & CONTEMP. PROBS. 73, 73 (2021)

Activities: Jewish Law Students Association, Board Member
Disabled & Allied Law Students Association, Founding Board Member
Penn Blockchain Association, Vice President
Teaching Assistant, Civil Procedure
Host, Law Review Online Podcast

THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, Binghamton, NY
B.A., *summa cum laude*, Philosophy, Politics, and Law, June 2018
Honors: Phi Beta Kappa
Activities: The Pipe Dream, Staff Writer
Critical Thinking Lab, Consultant

EXPERIENCE

QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York May 2021-August 2021
Summer Associate (offer extended)

- Performed legal research and writing for securities litigation matters and Section 230 claim.
- Researched and summarized various new avenues of business, specifically areas of potential litigation in the future, with a particular focus on issues related to cryptocurrency mining.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, Pennsylvania May 2020-September 2020
Research Assistant for Professor Stephen Burbank

- Researched the relationship between the Supreme Court and other federal courts, with a focus on the Courts of Appeals.

Research Assistant for Professor Tobias Barrington Wolff

- Researched the enforcement of injunctions by a federal district court different from the one that issued the injunction.

KAPLAN TEST PREP, Valley Stream, New York February 2019-July 2019
LSAT Instructor

- Through rehearsed lectures, and the administration of practice tests, ensured students were prepared for exam day.

WILLIAMS & CONNOLLY LLP, Washington, DC June 2018 - December 2018
Paralegal I

- Reviewed and categorized documents for use as deposition exhibits; assembled materials for client interviews and court appearances and facilitated litigation-related communications.

NEW YORK CITY CRIMINAL COURT, BRONX COUNTY, New York, New York June 2016 – July 2016
Judicial Intern to the Honorable Judge Anne Scherzer

- Observed several court cases; learned the process behind cross-examination, court proceedings, and general court etiquette.

THE CANDY AND COSMETIC DEPOT, Far Rockaway, New York Summers 2014 and 2016
Operations and Logistics Analyst

- Priced, listed, and packaged hundreds of items over the course of two summers and checked and maintained inventory.

INTERESTS

- Swimming, reading John Steinbeck, meditation, chess, perfecting my turkey sandwich recipe.

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LAW SCHOOL TRANSCRIPT

Fall 2019		**LAW**				
LAW	500	Civil Procedure (Burbank) - Sec 2	4.00	SH	A+
LAW	502	Contracts (Katz) - Sec 2A	4.00	SH	A
LAW	504	Torts (Hoffman,A) - Sec 2	4.00	SH	A
LAW	510	Legal Practice Skills (Govan) - Sec 2A	4.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Wigler)	(0.00)	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	16.00	SH	
Spring 2020		**LAW**			
LAW	501	Constitutional Law (Berman) - Sec	4.00	SH	CR
LAW	503	Criminal Law (Heaton) - Sec 2A	4.00	SH	CR
LAW	510	Legal Practice Skills (Govan) - Sec 2A	2.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Wigler)	(0.00)	SH	CR
LAW	583	Judicial Decision-Making (Scirica)	3.00	SH	CR
LAW	598	Financial Regulation (Sarin)	3.00	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	32.00	SH	
Summer 2020		**LAW**			
LAW	855	Law Meets M&A Bootcamp Competition	2.00	SH	CR
		Term Statistics:	2.00	SH	
		Cumulative:	34.00	SH	
Fall 2020		**LAW**			
GAFL	611	STATS FOR PUBLIC POLICY	3.00	SH	P
GAFL	621	PUBLIC ECONOMICS	3.00	SH	P
LAW	508	Property (Parchomovsky)	3.00	SH	A-
LAW	602	Employee Benefits (Lichtenstein/Zimmerman)	2.00	SH	A-
LAW	802	Law Review - Associate Editor	(1.00)	SH	NR
LAW	832	Asian Law Review - Associate			

		Editor	(0.00)	SH	CR
LAW	999	Teaching Assistant (Burbank)			
			2.00	SH	CR
LAW	999	Research Assistant (Wolff)			
			1.00	SH	CR
		Term Statistics:	14.00	SH	
		Cumulative:	48.00	SH	
Spring 2021		**LAW**			
GAFL	651	Public Finance and Public Policy			
			3.00	SH	A
GAFL	732	Public Management and Leadership			
			3.00	SH	A
LAW	638	Federal Courts (Struve)	4.00	SH	A-
LAW	802	Law Review - Associate Editor			
			0.00	SH	CR
LAW	832	Asian Law Review - Associate			
		Editor	1.00	SH	CR
LAW	999	Independent Study (Wolff)			
			3.00	SH	A-
		Term Statistics:	14.00	SH	
		Cumulative:	63.00	SH	
Fall 2021		**LAW**			
LAW	555	Professional Responsibility			
		(Hickok)	2.00	SH	A+
LAW	622	Corporations (Pollman)- Sec 2			
			4.00	SH	A-
LAW	650	Civil Practice Clinic Tutorial			
		(Rulli)	2.00	SH	A-
LAW	652	Civil Practice Clinic: Fieldwork			
		(Rulli)	4.00	SH	A-
		Term Statistics:	12.00	SH	
		Cumulative:	75.00	SH	
Spring 2022		**LAW**			
LAW	560	Lawyering and Technology (Wolson)			
			(2.00)	SH	NR
LAW	608	Blockchain and the Law (Tosato)			
			(3.00)	SH	NR
LAW	631	Evidence (Rudovsky)	(4.00)	SH	NR
LAW	999	Independent Study (Pollman)			
			(3.00)	SH	NR
		Term Statistics:	0.00	SH	
		Cumulative:	75.00	SH	

*** * * * * * * * * * * *COMMENTS* * * * * * * * * ***

The Law School adopted a mandatory Credit/Fail grading system for full-semester courses in Spring 2020 in response to the COVID-19 crisis.

DEAN'S PRIZE, awarded to the students attaining the highest grade point averages for the work of the first year;

Participant, Ninth Annual Intramural Mock Trial Tournament, Spring 2020

*** * * * * * * NO ENTRIES BEYOND THIS POINT * * * * * * * ***

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Issued To: SETH ROSENBERG
859 CRESTVIEW AVE
REFNUM:59861640
VALLEY STREAM, NY 11581-3117

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

Course Level: Undergraduate
First Admit: Fall 2014
Last Admit: Fall 2015

Current Program
Bachelor of Arts
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law

Degree Awarded Bachelor of Arts 20-MAY-2018
Primary Degree
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
201590		Advanced Placement EXM				
CHEM	101	Intro To Chemistry I	4.00	T		
ECON	162	Principles Of Macroeconomics	4.00	T		
HIST	1XX	1XX Level Course	4.00	T		
HUM	XXX	Humanities Elective	4.00	T		
MATH	1XX	100+ Level Course	4.00	T		
MATH	221	Calculus I	4.00	T		
PLSC	111	Intro To Amer Politics	4.00	T		
SOCS	XXX	Social Science Elective	4.00	T		
Ehrs: 32.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2015						
UG Harpur						
BA Philosophy Politics and Law						
AAAS	284B	Modern India 1757-2000	4.00	A	16.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
PHIL	107	Existence and Freedom (LEC)	4.00	A	16.00	
PSYC	111	General Psychology	4.00	A	16.00	
WRIT	111	Coming to Voice	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	103A	Foundations Of America (LEC)	4.00	A	16.00	
HIST	225	Imperial Russia	4.00	A	16.00	
PHIL	140	Intro To Ethics	4.00	A	16.00	
THEA	102	Introduction To Theater	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Fall 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	325	Red Phoenix: Revolution & USSR	4.00	A-	14.80	
PHIL	146	Law & Justice (LEC)	4.00	A-	14.80	
PHIL	147	Markets, Ethics And Law (LEC)	4.00	A	16.00	
PLSC	340	Public Opinion	4.00	A-	14.80	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 60.40 GPA: 3.77						
Dean's List						
Good Standing						
Spring 2017						
UG Harpur						
BA Philosophy Politics and Law						
ASTR	114	Sun, Stars And Galaxies	4.00	A	16.00	
ASTR	115	Observational Astronomy Lab	1.00	A	4.00	
HIST	374	China In The 20th Century	4.00	A	16.00	
PHIL	345	Philosophy Of Law	4.00	A	16.00	
PLSC	323	Congress In Amer Politics	4.00	A-	14.80	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 66.80 GPA: 3.92						
Dean's List						
Good Standing						
********** CONTINUED ON PAGE 2 **********						

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Fall 2017						
UG Harpur						
BA Philosophy Politics and Law						
HIST	380D	Global Early American Republic	4.00	A	16.00	
HWS	210	Men's Personal Wellness	4.00	A	16.00	
PHIL	456C	Justice and Gender	4.00	A	16.00	
PHIL	497	Critical Thinking Pedagogy	1.00	A	4.00	
PLSC	389W	Political Parties	4.00	A	16.00	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 68.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2018						
UG Harpur						
BA Philosophy Politics and Law						
ENG	360R	Romanticism	4.00	A	16.00	
HWS	110	Taekwondo	2.00	A	8.00	
PSYC	391	Practicum In College Teaching	4.00	P	0.00	
THEA	391	Practicum In College Teach I	4.00	A	16.00	
Ehrs: 14.00 GPA-Hrs: 10.00 QPts: 40.00 GPA: 4.00						
Good Standing						
Last Standing: Good Standing						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	96.00	92.00	363.20	3.94
TOTAL TRANSFER	32.00	0.00	0.00	0.00
OVERALL	128.00	92.00	363.20	3.94

********** END OF TRANSCRIPT **********

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Seth Rosenberg

Dear Judge Liman:

It is my pleasure to offer Seth Rosenberg an enthusiastic recommendation for a clerkship in your chambers. Seth is a smart young man with a superb work ethic and a focused analytical mind. He is very well suited to the work of a judicial clerk and will do superb work in whatever chambers snaps him up. I encourage you to take a close look at Seth in the application and interview process.

I have not worked with Seth in a classroom setting. Rather, he has served as a research assistant for me and is now writing a paper under my direction as an independent study. Because of the pandemic and the physical separation it imposed, our work together has been remote — I have not met Seth in person. But that limitation does not qualify the confidence of my recommendation. Seth is a very talented lawyer-in-training.

Seth and I began working on a research project after my friend and colleague Steve Burbank urged me to get to know him. The project on which I requested his assistance is an analytically complex one. I am working on an article about the enforcement of consent decrees entered in one federal district court by another federal court in a different location. The issue draws together questions of subject-matter jurisdiction, federal common law, choice of law and remedies doctrine. I walked Seth through the elements of the analysis that I wanted to explore and described the types of materials I wanted his help in gathering so I could canvas the full range of judicial treatments of this constellation of issues. In short order, Seth produced an excellent research file that included a comprehensive set of cases, some representative academic treatments of the issue, and a substantial annotated description of the materials he had gathered and how they might be useful. It was as good a research file as any I have received from a student.

Seth subsequently asked whether I would supervise his work on an independent study writing a paper about the Supreme Court's decision in Rodriguez v. FDIC (2020), a case in which the Court took an ungenerous approach to the role of federal common law in bankruptcy proceedings. As with the research materials Seth helped me gather, this was an analytically complex project in which Seth set out not only to critique the Court's reasoning as a matter of doctrine but to suggest an alternate approach to framing the role of federal courts in developing federal common law. We have met several times to talk about the project and each time I have been impressed with the ambitious scope of his interests and the methodical quality of his thinking. As of this writing, Seth is still early in the process of drafting the paper but what I have seen thus far already carries the promise of a first-rate piece of work.

In short, Seth Rosenberg has analytical chops. He has the talent, the discipline and the work ethic to do superb work in the most demanding chambers. He has earned the opportunity to develop a relationship with a wonderful judge, and I am delighted to lend him my strong recommendation.

Please do not hesitate to let me know if I can be of any further help in your review of Seth's candidacy.

Very truly yours,

Tobias Barrington Wolff
Jefferson Barnes Fordham Professor of Law
Deputy Dean, Alumni Engagement and Inclusion
Tel.: 415.260.3290
Email: twolff@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Seth Rosenberg

Dear Judge Liman:

I am delighted to recommend Seth Rosenberg for a clerkship in your chambers. Seth was my student in Civil Procedure and my advisee. He served as my Research Assistant during the summer after his first year, and as my Teaching Assistant in Civil Procedure last Fall. We have talked for hours, and I have a very good sense of his abilities and potential.

Seth came to Penn Law from SUNY Binghamton, where he compiled a stunning academic record, majoring in Philosophy, Politics, and Law, and graduating summa cum laude as a member of Phi Beta Kappa.

My course in Civil Procedure is generally regarded as the most challenging in the first-year curriculum. The doctrinal material alone includes very difficult concepts, but I expect my students to bring to their study of the cases perspectives (from, e.g., history, economics, and political science) that will enable them to get behind the doctrine. I also introduce them to, and expect them routinely to consider, questions of litigation strategy. I call on students “cold” (without prior notice), and I engage them in discussion for twenty minutes or so during each tour of the class.

Seth was the first student I called on during the first class of the Fall 2019 semester. That is not an enviable position to be in, particularly because the course begins with Sibbach v. Wilson, a notoriously difficult case in which the Supreme Court first interpreted the Rules Enabling Act of 1934. I remember this only because Seth’s performance on that occasion was arrestingly good. He had not only mastered the facts of the case and the doctrine. He had obviously thought a good deal about the policy implications of the Court’s decision. I was impressed, as I continued to be throughout the course.

In light of the grasp of the course material that Seth demonstrated in class and office hours, I was not surprised that he wrote the best examination paper in the class, the only one receiving a grade of A+, which I reserve for work that is superior not only on a comparative basis, but also standing alone. Seth’s performance in my class was no outlier. He won the Dean’s Prize for the highest grades in the First Year. A person of genuine intellectual curiosity, he has excelled throughout the curriculum.

As a result of his stellar work in my course, I asked Seth to serve as my research assistant last summer. I have been collaborating with Sean Farhang of Berkeley for a decade on quantitative and qualitative research that interrogates what we call the counterrevolution against federal litigation. One facet of that research has focused on class actions. Realizing that our data on Supreme Court class action decisions could not ground reliable inferences, if only because there are so few of them, we undertook a project to study class certification decisions in the U.S. Courts of Appeals, compiling a comprehensive dataset of decisions from 1967 through 2019. Preliminary analysis of these data suggested that some conventional wisdom about the tenor of class certification jurisprudence is, if not wrong, then misleading, perhaps because it is based on a small number of Supreme Court decisions. Seeking to situate our analysis of such a disconnect in a larger theoretical context, I asked Seth to conduct a review of the legal and political science literatures that treat the relationship between the Supreme Court and the Courts of Appeals, with special attention to the question of which level is leading and which following.

This was a very ambitious and difficult assignment, if only because it comprehended scholarship in multiple disciplines that deploys multiple research methods. Seth did a superb job, producing a paper of more than seventy pages that cogently surveys the landscape and identifies the primary theoretical approaches and conclusions of the work considered. It was immensely helpful to us in thinking about our empirical results.

I spent a great deal of last summer trying to learn how to teach virtually. After forty-five years of in-person teaching, this was not easy. Early on I decided that I would need a Teaching Assistant who both knew the material I would be teaching and was comfortable with the technology. I turned to Seth, who agreed to serve in that role. He did so with distinction, attending all of the classes, preparing quizzes, and even holding his own office hours.

Seth is drawn to litigation, and he is thoughtful about the special value of clerking for someone with his interests. He will be a superior law clerk. He is very smart, works hard, and writes well. He is respected by peers and faculty alike for his collegiality and would be a valuable and valued member of your chambers team. I recommend him with great enthusiasm and without reservation.

Sincerely,

Stephen B. Burbank

Stephen Burbank - sburbank@law.upenn.edu - (215) 898-7072

David Berger Professor
for the Administration of Justice
Tel.: (215) 898-7072
E-mail: sburbank@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Seth Rosenberg

Dear Judge Liman:

I understand that Seth Rosenberg is applying for a clerkship in your chambers. Seth, a member of our Law Review, is among the most intellectually engaged students in his class and seeks out opportunities for research and writing. I recommend him with great enthusiasm.

Seth was an outstanding class participant in my spring 2021 Federal Courts class. I used a panel system in that class in order to ensure that I called on each student multiple times during the semester. Seth served on panel during class days when we discussed federal habeas corpus and state sovereign immunity (respectively). Both times, Seth was well-prepared and his comments were uniformly insightful and on-target. He also regularly volunteered thoughtful comments and perceptive questions throughout the semester. (For example, when we were discussing the fact that a federal habeas court has discretion to raise a statute-of-limitations issue when the warden fails to raise that defense, it was Seth who thought to ask whether a court of appeals also possesses that discretion (I had not assigned any reading on Wood v. Milyard, 566 U.S. 463 (2012)).) Whether he was aptly addressing a hypothetical fact pattern or astutely critiquing the structure of Chief Justice Rehnquist's opinion in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the comments that Seth volunteered enriched our class discussions. Seth's very strong answers on the final exam placed his grade comfortably in the A-minus range. He did a particularly nice job with an essay question that asked exam-takers to assess how the operation of various doctrines that we had studied in the course would be affected by a plaintiff's decision to seek injunctive, rather than damages, relief.

Seth earned his B.A. summa cum laude in Philosophy, Politics, and Law. This interdisciplinary major – with its coursework in philosophy, history, and political science – appealed to Seth because it provided a broad liberal-arts course of study and a lot of opportunities for writing. Mid-way through his undergraduate studies, Seth interned with a trial judge in the New York State criminal court and solidified his interest in studying law. (He took a gap year between college and law school, during which he worked as a paralegal at Williams & Connolly and as an instructor for an LSAT preparation company.) Seth entered Penn Law with a strong continuing interest in studying political science, and this led him to enroll, as well, in the Masters of Public Administration program at Penn's Fels Institute of Government. As you can see from the Fels school coursework on Seth's 2L transcript, he completed four of the required courses for the MPA degree; but over time Seth came to realize that his interests lie more at the law school, and thus he has left the MPA program and expects to weight his coursework more heavily toward law school courses in his 3L year.

Meanwhile, Seth has found time to work as a research assistant for two of my colleagues and as a teaching assistant for my colleague Steve Burbank's 1L Civil Procedure class. He joined both the Law Review and the Asian Law Review. As a board member of the Jewish Law Students Association, Seth organized two events (one featuring a speaker who compared methods of reading texts in Jewish law and American constitutional law, and the other featuring speakers who compared the relationship between church and state in Israel and the United States). As a founding board member of the Disabled and Allied Law Students Association, Seth helped to draft a letter to the faculty urging the use of automated closed captioning in Zoom. I was very grateful for this well-informed and persuasive letter, which alerted me to a feature that I hadn't focused on before, and I adopted its suggestion (and have since made similar suggestions to other groups, such as the ALI, for their online events).

In sum, Seth is a top-notch student with a lively intellect who will be an excellent clerk, and I expect he will get along well with everyone in chambers. Please do not hesitate to let me know if there is any other information that would be useful to you.

Sincerely,

Catherine T. Struve
David E. Kaufman & Leopold C. Glass
Professor of Law
(215) 898-7068
cstruve@law.upenn.edu

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

WRITING SAMPLE

The attached writing sample is a ten-page excerpt of a memorandum that I drafted as a research assistant for Stephen Burbank, the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. I performed all the research, and this work is entirely my own.

Memorandum

To: Stephen B. Burbank

From**:** Seth Rosenberg

Date: July 27, 2020

Re: Literature Review

I. Focus of Memo

This memo identifies and discusses scholarship concerning the mechanisms of legal change when comparing the U.S. Supreme Court and the Federal Courts of Appeal. One partial aim of the research conducted for this memo is to assess who the true first movers are when it comes to legal change, or, in other words, which part of the judicial hierarchy is doing the leading, and which part is doing the following. It has been said that the Supreme Court is never too far ahead of public opinion.[1] Instead of addressing questions related to the Supreme Court's responsiveness to the broader populace, this memo addresses slightly different questions: Is the Supreme Court ever too far ahead of the lower courts? Or, alternatively, are the lower courts ever too far ahead of the Supreme Court?

II. Sources of Legal Change

a. The Scholarly Landscape – A Summary

I found some articles that directly focused on legal change,[2] and others that discussed the issue through a particular level of the judiciary.[3] Most articles that discussed legal change primarily focused on the Supreme Court.[4] I was, however, able to find articles that placed an

[1] *See, e.g.*, DEBORAH L. RHODE, LAWYERS AS LEADERS (2013).

[2] *See e.g.*, Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 U.C.L.A. Rev. 343, 345 (1998) ("One way to understand the role of the Supreme Court of the United States is to see it as a manager of legal change."); Douglas Rice, *The Impact of Supreme Court Activity on the Judicial Agenda*, 48 LAW & SOC'Y REV. 63 (2014) ("I find evidence in both trial and appellate courts that Supreme Court attention to policy areas subsequently leads to *fewer* cases being heard and decided in those policy areas in the lower courts. Yet I also find evidence of additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue.").

[3] *See, e.g.*, Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 596 (2017) ("In this Article, we consider the more basic question of lower court adherence to precedent. We address this principally by analyzing U.S. district court judges' treatment of precedents from the Supreme Court and courts of appeals across an eighty-year span.")

[4] *See, e.g.*, Bethany J. Ring, Comment, *Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality*, 23 CHAP. L. REV. 205 (forthcoming Winter 2020). Other authors focused on the Supreme Court but did not ignore the limits the Court faces in changing the law. *See* Baxter, *supra* note 2, at 345 ("Given the

emphasis on the lower courts.[5] Not all authors were confident in their analysis of legal change,[6] which suggests further study in this area is warranted. One article had shades of normativism,[7] and seemed to argue that regardless of whether the lower courts *do* affect legal change, it is their role to do so and, therefore, they *should* affect legal change.[8]

b. The Importance of the Lower Courts in Studying Legal Change

Even if the data demonstrates that the Supreme Court affects legal change, the lower courts will still be doing most of the legwork. So, studies of the Supreme Court's ability to change the law are incomplete without accounting for how the lower courts respond to the Court's actions.[9] It is important to gauge the extent that the Court affects the agenda of the lower courts, because if such an influence is found, then "the Court shapes both policy and lower court opportunities for compliance with the Court's preferences on that policy."[10] A more subtle way the Court can affect the issues dealt with by the lower courts is through the effects the Court has on litigants. When the Court speaks, others listen, and adapt.[11] The types of litigants primarily interested in individual success might be replaced by others primarily interested in moving public policy.[12] The Court's actions alter "the attention the federal courts devote to [an issue] and thus the influence the judiciary has on that issue, in subsequent years."[13]

Court's scarce resources and limited opportunities for review, other courts can blunt or delay the Supreme Court's law-reform projects with their own strategies of evasion or circumvention.").

[5] For example, one article assessed the role, over time, that the lower courts have played in the development of the law and concluded that "today's district court judges play a far less active role in shaping the law than their predecessors did." Devins & Klein, *supra* note 3, at 597.

[6] One author found mixed evidence of Supreme Court influence. *See* Rice, *supra* note 2, at 64 (finding that, in some policy areas, once the Supreme Court addressed an issue it led to "fewer cases being heard and decided in those policy areas in the lower courts," but also finding "evidence of . . . additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue").

[7] For a more detailed description of normative arguments, see Adam J. Kobler, *How to Fix Legal Scholarmush*, 95 IND. L.J. 1191, 1196 ("Descriptive claims address the way the world is, was, or will be. . . . Normative claims, by contrast, speak to how the world ought to be.").

[8] *See* Devins & Klein, *supra* note 3, at 599 ("[T]he doctrine of dicta compels the judge deciding a case to make her "own decision.").

[9] Ring, *supra* note 4, at 208 ("[T]o understand the true impacts of a singular Supreme Court ruling, a conscious research effort evaluating the lower courts' implementation is required . . . [otherwise,] unsubstantiated conjectures in the literature may come to be accepted as valid truisms, thus undermining [the literature] . . . .").

[10] Rice, *supra* note 2, at 63.

[11] *Id.* at 64. ("The Court's attention shifts the very participation of certain actors seeking to influence public policy in the federal courts, as issue areas go from being characterized by broad-based litigation to being characterized by less litigation, but more sophisticated participants.")

[12] *Id.*

[13] *Id.* at 65.

c. The Mechanisms of Legal Change

Just as authors utilizing a complexity approach spoke in terms of an equilibrium,[14] some authors did the same when adopting a framework to evaluate legal change.[15] The displacement of entrenched aspects of legal regimes creates an influx of complexity, and, as discomfort with newly ambiguous areas of the law permeates throughout the legal system, it sets "off a search for more determinate rules."[16] One way to study the mad dash that follows changes to prior understandings of law, is to focus on the questions that surround the fate of past cases decided under now-changed legal frameworks.[17] "Transitional moments"[18] in the law are not created equally: the more a change in the law implicates a "potential to unsettle the outcome of an enormous number of already decided cases,"[19] the more difficult the transitional period will be.

However, not every change in the law is necessarily destabilizing.[20] The degree of impact a legal change will have on the overall system is dependent on the context of the attempted change and whether these changes apply retroactively or prospectively. For example, grandfathering provisions, which provide that activities "initiated under an old rule will continue to be governed by that rule," are an example of some of the tools that can be "used to limit the impact of a legal change."[21] Other than the latter tools, external actors affected by legal change can make

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[14] *See, e.g.,* Doni Gewirtzman, *Lower Court Constitutionalism,* 61 AM. U.L. REV. 457, 499, 503 n. 243 (2012) ("Systems theorists often measure a system's performance by looking at the systems' resilience and adaptive capacity: its ability to survive, adjust, and thrive in a changing environment."); J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems - With Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1388 (2011) (defining the adaptive capacity of legal systems as "the system's ability to respond to "threats to system equilibrium … by changing resilience strategies without changing fundamental attributes of the system").

[15] *See, e.g.,* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Equilibrium theory provides a framework for evaluating legal change as a function of the legal context into which that change is introduced."); Hathaway, *supra* note 27, at 606, 609 (arguing that "[t]he doctrine of stare decisis . . creates an explicitly path-dependent process," and that when assessed as an "increasing returns" path dependent process, we should expect the law to produce "multiple [possible] equilibria"); Kastellec, *The Judicial Hierarchy: A Review Essay, supra* note 5, at 10 ("In equilibrium, the Supreme Court is most likely to review cases from the side of the conflict it eventually rules against, because these cases are most informative.").

[16] *Id.* at 740.

[17] Toby J. Heytens, *The Framework of Legal Change*, 97 CORNELL L. REV. 595, 595-96 (2012) ("[T]he same basic question arises again and again: What should we do about all those other cases that courts have already resolved using legal principles that were subsequently tweaked, overhauled, or rejected? In a previous article, I called situations raising that question 'transitional moments.'").

[18] *Id.*

[19] *Id.*

[20] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Adoption of a new legal rule can, but need not, constitute a destabilizing influence on the underlying legal structure. Equilibrium theory thus provides a tool for judging stability within the legal system.").

[21] *Id.* at 1067.

impactful change more difficult, if only because it can be hard to fully predict how such actors will respond to legal change. For example, as social workers become more involved with divorce proceedings, the role of social workers and the tenor of divorce proceedings have changed concurrently.[22] A separate but related issue is the possibility that external actors fail to respond to legal change at all. The potential for the law to affect societal change has it limits.[23] And while the source cited in the latter footnote focused on the economy, and not the judiciary, it at least appears intuitively correct that the Supreme Court's attempts at legal change would butt heads with deep-rooted norms in the lower courts in ways that would lessen the Court's overall impact.

Legal change is most likely to occur where the law is indeterminate. This is because judges are unlikely to change the law where it is settled and clear, or at least this is the expectation. Confusion in the law is where legal scholars can assist lower courts left without guidance,[24] but unfortunately, "[s]cholars currently lack a concrete theory of how courts should proceed in such situations."[25] Worse still, the solutions offered to the Supreme Court's unstable approach to statutory interpretation seem to imply that any consistent approach is better than no consistency at all, that uniformity and simplicity are *per se* virtues for the Court when they make changes to the law.[26] In deciding how to change the law, and when, the Court must "negotiate the trade-off between the institutional and epistemic benefits of formal law and the costs of applying flawed tests."[27]

To fully flesh out the above discussion of legal indeterminacy, it is necessary to see how and why such gaps in the law develop. The Court's decision to change the law, and the extent that

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[22] Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 743-744 (1988) ("As the formal role of social workers evolved, so did their ideology and rhetoric. Consistent throughout the evolution of social workers' involvement with divorce, however, has been their perception that their appropriate function is to make divorce as conflict-free as possible, or at least to manage the conflict appropriately.")

[23] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-stakeholder Divide*, 36 IOWA J. CORP. L. 59, 111 (2010) ("[T]here is reason to doubt that legal change alone will lead to structural or institutional change in the actors and relationships that are entrenched in the economy.").

[24] Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 594 (2018) (arguing that the way the Courts have dealt with the scope of the Fourth Amendment is one example of what the author terms a "legal blank slate," because "formal law is essentially silent on the issue, yet judges are compelled to set some standards to guide future courts and other legal actors, [and thus,] [c]ourts seeking to move beyond the confusion of current Fourth Amendment law are left with a blank slate.").

[25] *Id.* at 591.

[26] *Id.* at 211-12 ("The explicit premise of much of this work is that 'often it is not as important to choose the best convention as it is to choose one convention and stick to it.' I refer to this trend toward simplification and uniformity as "the dumbing down of statutory interpretation.") (footnote omitted).

[27] Tokson, *Blank Slates*, *supra* note 196, at 596.

they can succeed in this effort, is a pendulum that swings from hyperactivity to complete silence. This dynamic occurs over the course of decades, and, despite the fact that this often leaves the lower courts without guidance for long stretches at a time, the lower courts are still tasked with developing the law in these areas.[28] Sometimes the confusions produced by Supreme Court decisions are accidental, but that does not mean the Court is quick to correct the unintended consequences of its decisions.[29] However, it is hard to believe the Court is entirely innocent when changes in the law develop after a decision is issued.[30]

One manifestation of the Court's varying level of activity in addressing gaps in the law are intercircuit splits. The resolution of intercircuit splits is "responsible for the lion's share of legal development in federal courts."[31] Although splits create difficulties for the judicial system, the resource constraints imposed on the Court make splits somewhat unavoidable. This is because "the Supreme Court depends crucially on litigation in lower courts to yield information about the relationship between legal rules and outcomes in the real world."[32] In other words, one can think of legal changes as hypotheses put forth by the Supreme Court and the responses of the lower courts as the data necessary to assess those hypotheses. The Court benefits from leaving an area of the law untouched for long stretches of time because allowing the lower courts to develop the

[28] *See, e.g.*, Peter J. Hammer, *Questioning Traditional Antitrust Presumptions: Price and Non-price Competition in Hospital Markets*, 32 U. MICH. J.L. REFORM 727, 741 (1999) ("While the Supreme Court has taken a noticeable hiatus from section 7 jurisprudence, the lower courts and the enforcement agencies have continued to refine the process of merger analysis."); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 384 (2020) ("During the Court's jurisdictional *hiatus*, the *lower courts* developed and applied a framework for adjudicative authority constructed, to the extent possible, from the *Supreme Court*'s binding pronouncements. This undertaking was not [easy,] predominantly due to the Supreme Court's avoidance of--or inability to resolve--several foundational jurisdictional issues.")

[29] Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 435 ("[The] *Marks* 'narrowest ground' doctrine has failed to accurately predict the outcome of future Supreme Court decisions. This failure can lead to discontinuity and uncertainty regarding important legal principles because of the break between prior interpretations of Supreme Court decisions by lower federal courts and the Supreme Court's later, conflicting resolution."). One author succinctly described the mechanism for how accidental legal change occurs. *See* Hasen, *supra* note 25, at 792 ("Inadvertence occurs when the Court changes the law without consciously attempting to do so, through attempts to restate existing law in line with the writing Justice's values.").

[30] One author, discussing various ways Supreme Court Justices move the law, was less equivocal. *See* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781-82 (2012) ("[P]erhaps the most common reason that a Justice will vote to hear a case will be to make some change in existing law.")

[31] Beim & Rader, *supra* note 25, at 450.

[32] Clark & Kastellec, *supra* note 8, at 152.

law gives the Supreme Court a far more extensive record of the effects of attempted changes to the law. Additionally, more eyes should infuse more creativity into the law.

The resolution of intercircuit splits—and by extension the decision to change the law—is a tradeoff. The Court must choose between the costs associated with leaving splits unresolved[33] on the one hand, and the informational benefits received from "allowing other lower courts to make their own independent judgments,"[34] on the other. When the Court resolves a split, "[i]t chooses to forego the additional information it might glean from allowing the legal question to further play out in the lower courts."[35] At the same time, however, resolution of intercircuit splits "swiftly eliminates the lack of uniformity in the law created by the conflict, by settling the issue."[36] Multiple models of the Court's behavior with regard to circuit splits indicate that "the Court should be more likely to end a conflict immediately . . . when a conflict emerges after several lower courts have already weighed in on a new legal issue."[37]

Although when resolving intercircuit splits, and by extension affecting legal change, the Court tends "to join the [position taken by a] majority of circuits,"[38] sometimes the Court disregards widespread views in the lower courts.[39] Thinking of the judicial process as a dialectic might help explain why the latter occurs.[40] If we view interactions between the Supreme Court

[33] *Id.* (discussing how *United States v. Booker*, 543 U.S. 220 (2005), "which ruled that federal district court judges were to treat the U.S. sentencing guidelines as advisory rather than mandatory," caused an intercircuit split, which effectively meant that "defendants with similar cases faced different standards of appellate review of their sentences, depending on where they committed their crimes").
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 10. *See also* Beim & Rader, *supra* note 25, at 449 ("'Well-percolated' splits . . . are no more likely to be resolved by the Supreme Court. The likelihood of resolution does not increase as more cases arise in a split.")
[38] Clark & Kastellec, *supra* note 8, at 152. *See also* Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 9 ("[W]hen the justices review circuit conflicts, they are more likely to come down on the side of the issue that was favored by a majority of the circuits, suggesting that the justices are engaging in vertical learning.").
[39] *See, e.g.*, Heytens, *The Framework of Legal Change*, *supra* note 188, at 597 ("Until 2009, the widespread view in the lower courts was that a police officer who had lawfully arrested [drivers,] could, without need for any further justification, search the entire passenger compartment of the vehicle. In *Arizona v. Gant*, [556 U.S. 332 (2009),] however, the Supreme Court rejected that position . . . ."). The same author went on to point out that *Gant* is not the first time "the Supreme Court changed the law in a way that threatened to call into question a great many previous convictions and sentences. The Warren-era Court, of course, did that sort of thing all the time. But the Rehnquist-era Court did it quite a few times too . . . ." *Id.* 603.
[40] *See, e.g.* Siegel, *supra* note 18, at 1187 ("The dialectical, side-by-side model of judicial interactions developed in this Article is distinct from approaches that emphasize either top-down hierarchy or bottom-up resistance or percolation.").

and the lower courts as a conversation, then this phenomenon makes more sense. Under this view, the federal courts are "a system in which lines of communication and influence can run back and forth, not just down."[41] When the Court speaks, it has the final say in this conversation, but the lower courts still retain a powerful voice. So, it makes sense that, as in any conversation between a superior and a subordinate with valued opinions, the Court, in resolving splits, sometimes listens to the majority of circuits, and other times appears to flout them.

The dynamic between the Court and the lower courts is better described as an informational dialectic, as the Court and the lower courts are not truly "talking." This dialectic begins when the Court establishes precedent with "a degree of uncertainty regarding how these precedents will actually play out . "[42] Then, as the lower courts implement that precedent, the ideological nature of that implementation, provides "information to [the Supreme Court] about the implications of the precedent as it is applied to contemporary disputes."[43] Lastly, the Court then uses "this information to correct its body of precedent."[44] Where the Court has not put forth firm precedent, such as with a plurality decision, the lower courts have a greater role in this dialectic.[45] One major caveat to this discussion is that while reasoning from lower court opinions should benefit the Supreme Court, "it is unclear whether that reasoning actually reaches the Supreme Court."[46]

While the above discussion of the mechanisms of legal change is important, it is equally valuable to assess the multiple options available to the Court when it seeks to change the law. One author argued that the problem with past scholarship on how the Supreme Court affects the lower courts is that it focuses on the "decision-making stage, but [ignores] the prior step in which cases actually arrive in lower courts."[47] The same author went on to argue that understanding whether the Supreme Court can and does manipulate "what is on the agenda of the lower federal courts . . . is crucial to understanding the decision-making process."[48] These comments suggest

[41] Siegel, *supra* note 18, at 1223-24.
[42] Hansford et al., *supra* note 7, at 894.
[43] *Id.* at 895.
[44] *Id.*
[45] *See* Marceau, *supra* note 148, at 975-76 ("Under the limited class of cases in which the Court applies Marks there is often substantial deference shown to lower court agreement as to the precedent flowing from a prior plurality.")
[46] Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction,* 74 OHIO ST. L.J. 423, 439 (2013).
[47] Rice, *supra* note 172, at 65.
[48] *Id.*

that there is still much to learn regarding the Supreme Court's ability to change the law.[49] However, there were some authors who at least catalogued the potential methods the Court can use to change the law. Some approaches to changing the law are direct: the Court can expressly try to change the law by overruling or extending precedent;[50] or alternatively, the Court can invite "litigants to argue for the overruling or extension of precedent."[51] Other methods are less direct, such as anticipatory overruling, where the Court signals that while precedent is safe for the moment, it may not fare much better in the future.[52] In the past anticipatory overruling were more overt, but recently "the Court has backed off such express anticipatory overrulings."[53] Related to the practice of anticipatory overruling is "stealth overruling,"[54] in which the Court functionally, but not explicitly, overrules an existing precedent. One way this can happen is through overly complex qualifications on the precedential value of an opinion or legal rule.[55] Still other methods of changing the law are hiding in plain sight: what one author described as "time bombs,"[56] or "seemingly offhand, throwaway phrases that [are then] exploited in later cases."[57]

Regardless of the Court's actual impact on the state of the law, there are built-in limits to the Court's influence. The Court constrains itself through both formal and informal "rules and norms

[49] *Id.* ("[W]e do not know whether and how the Supreme Court influences what lower federal courts discuss and decide. Yet history suggests influence does exist.").
[50] Hasen, *supra* note 25, at 782.
[51] *Id.* at 784.
[52] *Id.* at 783 (describing the Court's decision in Northwest Austin Municipal Utility District Number One v. Holder, 129 S. Ct. 2504 (2009), as "signaling that [the Court] would not be so charitable when reviewing the [constitutionality of section five of the Voting Rights Act] in the next case").
[53] *Id.* at 784. One author quoted Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), as an example of past anticipatory overrulings. This example serves as a useful reference point for how the Court has transitioned in its use of this tactic. *See id.* ("[T]he Court held that the Bankruptcy Act of 1978 was unconstitutional . . . [but] stayed its own ruling to give Congress 'an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of bankruptcy laws.'").
[54] Hasen, *supra* note 25, at 780 ("The Roberts Court also has engaged in 'stealth overruling.' Stealth overruling occurs when the Court does not explicitly overrule an existing precedent. Instead, it 'fails to extend a precedent to the conclusion mandated by its rationale,' or it 'reduces a precedent to nothing.'").
[55] *See, e.g.*, Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1535 (2008) (quoting an example of disingenuous judicial behavior, provided by legal scholar Karl Llewellyn, whereby a court distinguishes "a prior decision by declaring 'this rule holds only of redheaded Walpoles in pale magenta Buick cars.'") (footnote omitted).
[56] *Id.* at 789. (giving credit for the term to SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).
[57] *Id.* (quoting SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).

that govern the Court's own decision-making processes,"[58] and is additionally constrained by forces, such as losing litigants who do not seek appeal, that work to diminish "the occasions upon which the Court will have an opportunity to issue law-changing decisions."[59] Of particular relevance, when the Court attempts to move the law, it must account for the viability of faithful implementation in the lower courts.[60] Stare decisis is likely the most well-known limitation imposed on the Court. Because stare decisis is based "on the need for consistency, efficiency, [and] predictability,"[61] it acts as a judicial levee preventing a constant flood of legal change. Even though stare decisis can be circumvented by creatively distinguishing or reconciling precedent, such "creativity must be bounded by intellectual candor."[62] One author seemed to imply that the degree of faithfulness to stare decisis is a function of the Court's appetite for legal change.[63] Luckily, however, the Justices are not entirely free to change the law on a whim, as there are costs to legal change.[64]

The general requirement of reason-giving inherent to opinion writing is arguably heightened when considering attempted changes to the law. [65] While the latter is supposed to limit those Supreme Court Justices that are hungry for legal change, one author expressed concern that this intuitively heightened reason-giving requirement has been abandoned in an "insidious manner."[66] For example, in *Gonzales v. Carhart*,[67] "the Court upheld the constitutionality of a federal law prohibiting so-called 'partial birth abortions,' even though the Court had held a virtually identical state law unconstitutional seven years earlier . . . [but] offered no principled

[58] Baxter, *supra* note 119, at 346.
[59] *Id.* at 345.
[60] *See* Tokson, *Judicial Resistance and Legal Change*, *supra* note 25, at 967 ("In general, judicial resistance to doctrinal change may present another obstacle to the pursuit of meaningful social change via the courts.").
[61] Stone, *supra* note 229, at 1534.
[62] *Id.*
[63] *Id.* at 346.
[64] *See, e.g. id.* ("[O]verruling has costs for the prevailing majority – perhaps impaired relations with fellow Justices who would have adhered to the precedent, the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.").
[65] *See id.* ("[T]he Court is expected to provide reasoned explanations for its decisions. This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents.") (footnotes omitted). One author normatively argued that even if one posits that there is not a heightened requirement for reason-giving, there ought to be one. *See* Stone, *supra* note 229, at 1534 ("[B]ecause the act of overruling a prior decision is and should be relatively unusual in our legal system, such an act when it occurs should be openly acknowledged, explained, and justified.").
[66] Stone, *supra* note 229, at 1537-38 ("Their technique, which was perfectly anticipated and ridiculed by Karl Llewellyn, is to purport to respect a precedent while in fact cynically interpreting it into oblivion.").
[67] 127 S. Ct. 1610 (2007).

basis for ignoring the earlier decision."[68] The positions offered by Justices in recent situations where the Court has arguably perverted stare decisis are only supportable "if they were writing on a clean slate."[69] However, the Court is *not* writing on a clean slate, and so, when the Court functionally overrules precedent but does not own up to what it is doing, it is being dishonest. Such dishonesty is damaging to judicial integrity and confounding for the study of legal change.[70]

d. Notes for Future Scholarship in this Area of the Law

Supreme Court decisions need time to breathe before an adequate assessment of their impact is possible.[71] Unfortunately, "a majority of academic and popular commentary frequently occurs within a few years of a decision, and by its very nature, such commentary is incapable of assessing any long-term effects."[72] Moreover, because it is in the Court's best interests not to draw attention to itself when acting with the potential for public backlash, scholars are alone sometimes in choosing cases which have already or will in the future produce legal change.[73] So even results that appear to demonstrate either the Court's failure to create legal change or a choice not to must be taken with a grain of salt, as the Court could be "stealth overruling."[74] The sometimes covert nature of legal change leads to misfires: scholars anticipate a certain case in the pipeline will effect momentous legal change, and then no such change occurs.[75] This demonstrates either that changes in the law are generally difficult to predict or that scholars do not yet fully understand how legal change occurs; thus, this is an area ripe for further study.

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[68] Stone, *supra* note 229, at 1538 (footnote omitted).
[69] *Id.*
[70] One author argued that "[t]he sad truth is that Roberts and Alito seem to have been driven by nothing more than their own desire to reach results they personally prefer . . . ." *Id.* Of course, the Court has not always been fully honest in its opinions, and so this is not a new phenomenon. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO L.J. 1, 4 (2010) ("Stealth overruling is assuredly not unique to the Roberts Court . . . the Warren Court, for example, did it as well . . . .").
[71] Ring, *supra* note 174, at 207 ("Supreme Court decisions such as *Reed* are analogized herein to pebbles cast into a pond. Ofttimes, the mass of the pebble is not fully understood before it is launched; but the ripples it produces can be easily observed and analyzed, given sufficient time.").
[72] *Id.*
[73] Hasen, *supra* note 25, at 780 ("Despite the Citizens United ruling, and maybe now more because of the public reaction to it, express overrulings of precedent are rare.").
[74] *Id.*
[75] *See* Ring, *supra* note 174, at 207 ("Because they operate as the final say, Supreme Court opinions are ofttimes the subject of academic ponderings and predictions in literature. Occasionally, however, these jurisprudential prophecies may fail to materialize.").

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February 28, 2022

The Honorable Lewis J. Liman
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Daniel Patrick Moynihan United States Courthouse
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Dear Judge Liman:

I am a third-year student at the New York University School of Law, and I am writing to express my interest in a clerkship in your chambers for the 2024-2025 term. I am particularly interested in clerking in your chambers after understanding the respect and enthusiasm you have for judging when you spoke at a Summer 2021 conversation with Cleary Gottlieb summer associates. Enclosed with this cover letter is my current resume, my undergraduate and law school transcripts, a writing sample, and three letters of recommendation.

Prior to law school, I studied public policy at the University of Michigan, after which I worked at Cornerstone Research, a litigation consulting company supporting economic and financial experts. I believe that my general civil litigation experience supporting both plaintiffs and defendants, as well as both the federal government and private parties, would allow me to be of immediate assistance in your work.

My writing sample, an excerpt of an essay that I drafted for my Legislation and Regulatory Policy Clinic with the supervision of Professor Bob Bauer, demonstrates my interest in antitrust law. Throughout law school, I have not only studied this field in the classroom, but also pursued it through research and various internships in the federal government.

Letters of recommendation on my behalf were prepared by Professors Harry First, Scott Hemphill, and Emma Kaufman. Professor First served as my supervisor for previously completed directed research. I was in Professor Hemphill's Antitrust Law class during my 2L year and Professor Kaufman's Legislation and the Regulatory State class during my 1L year. I also served as a research assistant for both Professors Hemphill and Kaufman.

Thank you for your consideration.

Respectfully,

/s/

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CLEARY GOTTLIEB STEEN & HAMILTON LLP, Washington, D.C.
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PROFESSOR SCOTT HEMPHILL, **NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY
Research Assistant, August 2020–May 2021; December 2021–Present
Drafted paragraphs and updated citations for a new edition of an antitrust law casebook. Researched antitrust issues relating to common ownership and nascent competitors for forthcoming law review articles.

DEPARTMENT OF JUSTICE, **ANTITRUST DIVISION**, Washington, D.C.
Volunteer Intern, ***Technology and Financial Services Section***, June 2020–August 2020
Analyzed evidence for an investigation of a large technology company, including legal research and document review to evaluate market definition, leading interviews of market participants, and contributing to internal memoranda. Drafted memoranda to section chiefs regarding pre-merger filings, including whether further investigation was necessary.

CORNERSTONE RESEARCH, San Francisco, CA
Senior Analyst, July 2018–June 2019
Coordinated a team of five analysts to determine the damages from Most Favored Nations clauses in healthcare provider contracts, communicating with lawyers consistently to file a 120-page expert report on behalf of the plaintiff. Managed a team of three to estimate royalties for cellular patents in a breach of contract lawsuit. Led the analyst recruiting team, which involved organizing on-campus recruiting teams, leading candidate decision meetings, and interviewing over 30 candidates.

Analyst, July 2016–June 2018
Composed portions of Market Definition, Head-to-Head Competition, and Barriers to Entry sections in the FTC's expert report in *FTC v. Wilhelmsen/Drew*, successfully blocking a $400 million merger. Supervised the filing of eight expert reports in various matters for fact-checking and production purposes.Í

ADDITIONAL INFORMATION

Proficient in SQL and R data analysis languages. Enjoy rock climbing, skiing, and cooking.

Name: **Matthew Rosenthal**
Print Date: **01/25/2022**
Student ID: **N19864844**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Amanda S Sen			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Rachel E Barkow			
Procedure	LAW-LW 11650	5.0	A
Instructor: Burt Neuborne			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Big Tech and Standard Oil			
Instructor: Christopher Scott Hemphill			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Corporations	LAW-LW 10223	4.0	CR
Instructor: Ryan J Bubb, Richard Rexford Wayne Brooks			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Emma M Kaufman			
Torts	LAW-LW 11275	4.0	CR
Instructor: Barry E Adler			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

National Security Law and Policy Seminar	LAW-LW 10067	2.0	A-
Instructor: Lisa Monaco			
Antitrust Law	LAW-LW 11164	4.0	A-
Instructor: Christopher Scott Hemphill			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	3.0	B+
Instructor: Stephen Gillers			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Adam M Samaha			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff, Arthur R Miller			
Administrative Process Seminar	LAW-LW 10470	2.0	A
Instructor: Robert A Katzmann			
Directed Research Option A	LAW-LW 10737	2.0	A
Instructor: Harry First			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Emma M Kaufman			
Science and the Courts	LAW-LW 12668	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	58.0	58.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2021

School of Law
Juris Doctor
Major: Law

Legislative and Regulatory Process Clinic	LAW-LW 12230	8.0	A
Instructor: Sally Katzen Dyk, Robert Bauer			
Legislative and Regulatory Process Clinic Seminar	LAW-LW 12231	6.0	IP
Instructor: Sally Katzen Dyk, Robert Bauer			

	AHRS	EHRS
Current	14.0	8.0
Cumulative	72.0	66.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Journal of Legislation and Public Policy	LAW-LW 10621	1.0	***
Survey of Intellectual Property	LAW-LW 10977	4.0	***
Instructor: Jeanne C Fromer			
Negotiation	LAW-LW 11642	3.0	***
Instructor: Claire E James			
Property	LAW-LW 11783	4.0	***
Instructor: Gregory Ablavsky			

	AHRS	EHRS
Current	12.0	0.0
Cumulative	84.0	66.0

Staff Editor - Journal of Legislation & Public Policy 2020-2021

End of School of Law Record

New York University
A private university in the public service

School of Law

Emma Kaufman
Assistant Professor of Law

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June 14, 2021

RE: Matthew Rosenthal, NYU Law '22

Your Honor:

I'm writing to recommend my student, Matt Rosenthal, who has applied for a clerkship in your chambers. Matt is sharp, diligent, and kind. He would make an excellent law clerk.

I first met Matt when he was a student in my 84-person course called Legislation and the Regulatory State (LRS). LRS, a required first-year course at NYU, can be challenging for many students. It is a crash course in statutory interpretation, structural constitutional law, and administrative law—full of tricky, unsettled doctrine and recent Supreme Court cases. LRS is a real conceptual departure for 1Ls who have been taking common-law courses like torts and criminal law, so it becomes a class where the most intellectually curious and serious students can rise to the occasion.

Matt did a great job in my class. He was well-prepared, engaged, and clearly understood the material. I've since learned that Matt has a real passion for administrative law. He wants to be a government lawyer and has taken a series of challenging courses in the field, including complex litigation, antitrust, and an administrative process seminar with Judge Katzmann. He is, in other words, a serious and directed person.

In the end, I did not give Matt a grade in my LRS course. (The COVID-19 pandemic began about three weeks into the semester. Given the uneven effects the sudden onset of the pandemic had on the 1L class, the law school switched to a pass-fail format for that spring.) But I can report that Matt performed well on my exam and stood out enough that I hired him to be my Research Assistant in his second year.

I take RA hiring seriously, selecting only students who seem exceptionally smart and easy to supervise. Matt has not disappointed on either front. His legal research (into state criminal procedure rules and state grand juries) has been comprehensive, clear, timely, and incisive. Conversations with him are interesting, efficient, and smooth. In short, Matt has made my life easier and my work better. I suspect you'd find the same in chambers.

I know Matt would learn a tremendous amount from working for you and I hope you'll take a serious look at his application. Please do not hesitate to reach out if I can offer any additional information.

Sincerely,

Emma Kaufman

New York University
A private university in the public service
School of Law
Faculty of Law

40 Washington Square South
New York, NY 10012-1099
Telephone: (212) 998-6211
Fax: (212) 995-4760
E-mail: hf3@nyu.edu

Professor Harry First
Charles L. Denison Professor of Law
Co-Director, Competition, Innovation, and Information Law Program

Dear Judge:

Matthew Rosenthal has asked me to write a letter of recommendation for him in connection with his application for a judicial clerkship. I recommend Mr. Rosenthal to you highly.

I know Matt from a directed research project that he is doing with me. We require all of our students to write some form of research paper, a requirement that most fulfill in the context of a seminar. A few of our students, however, fulfill this requirement by doing an independent writing project under the direction of a faculty member. These directed research projects are the equivalent of a course, requiring the student to do in-depth research and writing about a significant legal topic.

Matt came to me with his project last fall. The topic sounds deceptively simple—when to balance the anticompetitive effects in one market against possible procompetitive effects in another—but the issue has proved particularly troublesome for antitrust because of the difficult trade-offs it may require courts and enforcers to make. Antitrust commentators have written about the topic, but, so far, without producing an analysis that has commanded widespread agreement. Meanwhile the topic continues front and center in important cases, including high technology and labor markets.

Matt came to this topic from work he had done for an economics consulting firm prior to coming to law school. So far, Matt has produced a detailed first draft, about which we have had many discussions. He has an excellent command of the cases and the literature and he is still working through his solution. His goal is to arrive at an approach that will produce good results while still being administrable.

I think that Matt's work shows a top-flight ability to do legal research and writing on a difficult issue and to persevere in that effort. I would think that these would be just the qualities that would make him a top-flight law clerk. And besides, he is smart, thoughtful, and easy to work with. I urge you to consider him.

I hope that this recommendation has been helpful. Of course, please let me know if there is any further information I can provide.

Sincerely,
Harry First
Charles L. Denison Professor of Law

February 28, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to recommend Matt Rosenthal for a clerkship in your chambers. I recommend him to you with great enthusiasm.

I first met Matt as a 1L in my "Big Tech and Standard Oil" reading group, where we read parts of Chernow's biography of Rockefeller alongside modern analyses of Amazon, Apple, Facebook, and Google (and their founders). Matt stood out for his deep preparation and probing questions about competition and innovation. His pre-law school career at Cornerstone equipped him well to interrogate received wisdom about industry structure and conduct pertaining to the leading online platforms. I was very glad to have him in the reading group, and the following year in my antitrust course.

Matt has done outstanding work as a research assistant under my supervision. Most of his effort has been devoted to the new edition of the Areeda antitrust casebook. One major task was a deep dive into the modern antitrust treatment of intellectual property licenses, as well as related law such as the government's authority to order compulsory licensing of a patented invention. The resulting work product was a series of analyses of various current issues: the first sale doctrine, patent suppression, and so on. Matt's memos were thorough and elegant, a big help in improving the casebook's treatment of these issues.

Matt's attention to detail became apparent when I asked him early on to review a lengthy excerpt of a particular case. To my surprise, he demonstrated that certain aspects of the exposition were unclear or misleading, and suggested improvements. He showed similar persistence and dedication in reviewing several chapters for small errors that previous sweeps had missed. At the same time, Matt has a good eye for the big picture as demonstrated by his writing sample, which explores the principles underlying so-called "out-of-market" efficiencies in a subtle and engaging way.

I expect Matt will thrive as an antitrust lawyer, with a view to government service down the line. A clerkship is an ideal next step along that career path. I am confident that Matt will thrive as a clerk, and recommend him to you with great enthusiasm. Please let me know if I can answer any questions or sing his praises at greater length.

Sincerely,
C. Scott Hemphill

Scott Hemphill - hemphill@nyu.edu - 212.992.6156

WRITING SAMPLE OF MATTHEW ROSENTHAL
NEW YORK UNIVERSITY SCHOOL OF LAW
J.D. CLASS OF 2022

This writing sample is an excerpt of a paper that I have submitted for my Legislation and Regulatory Policy clinic. My paper analyzes how lower courts have implemented *Eastman Kodak Co. v. Image Tech. Servs., Inc.*—the only Supreme Court case directly addressing the question of whether a company can possess market power in an aftermarket—and if its rationale could be extended to antitrust cases involving digital platforms.

The sections prior to this excerpt describe the framework outlined in *Kodak* and open questions lower courts have grappled with since. This excerpt is the third section of my paper and applies the current state of the law to various digital platforms.

I. Applying *Kodak* to Digital Platforms

As the above discussion suggests, a single-brand aftermarket theory has not frequently been evaluated by courts in the context of digital platforms, or technology products more widely. Whether these products could be subject to antitrust scrutiny using such a theory is an open question that implicates both the aftermarket theory's economic and legal underpinnings. Economic critiques, for example, suggest that because various services provided by digital platforms are "additive," operators of these platforms face a fundamentally different economic calculus when deciding whether to increase aftermarket prices.[1] These critics suggest that the profit-maximizing price in aftermarkets of digital platforms may not increase if the platform possessed market power, thus minimizing any anticompetitive effects.[2] Despite this argument, the case studies presented below will demonstrate that, assuming certain public facts to be true, some digital platforms do appear to be subject to an aftermarket theory.

A. App Stores

1. Relevant Facts and Conduct

The digital platform that has received the most attention from courts and commentators when discussing aftermarket theories are app stores on various mobile operating systems ("OSs"). Both Apple and Google—the two largest mobile device OS providers in the United States[3]—operate app stores through which customers may download applications onto their mobile device. Both companies are alleged in different lawsuits to have illegally protected their respective monopolies over app distribution on their OSs by making the loading of apps through

[1] *See* John M. Yun, *App Stores, Aftermarkets & Antitrust*, 53 ARIZONA STATE L. J., at 29 (forthcoming 2022).
[2] *Id.* at 33-34.
[3] *Mobile Operating System Market Share United States of America*, STATCOUNTER, https://gs.statcounter.com/os-market-share/mobile/united-states-of-america/#yearly-2009-2022 (last visited Jan. 17, 2022).

means other than the app store (*i.e.*, "sideloading) very difficult.[4] Plaintiffs have also alleged that each company has illegally protected their monopolies over in-app payment processing systems.[5]

In particular, Apple, whose OS is named iOS, does not allow app stores other than Apple's to be loaded onto its phones. Additionally, Apple requires developers who intend to offer their app through the Apple app store to (1) "[c]reate apps for Apple products which could only be distributed through the App Store,"[6] (2) require that any payments made inside an app be conducted through Apple's in-app payment system,[7] and (3) submit their apps for review by Apple to ensure that the app meets the contractual requirements.[8]

Google, whose OS is named Android, ostensibly allows sideloading and is alleged to have engaged in conduct that is effectively equally as restrictive. In particular, plaintiffs allege that Google erected barriers to entry by competing app distribution platforms through deception of customers and contractual restrictions on Android phone manufacturers (*i.e.*, original equipment manufacturers, or "OEMs") and app developers.[9]

While the conduct varies slightly between the two companies, all of the conduct is alleged to have similar effects. Apple's and Google's policies are alleged to have stifled the development of app distribution platforms with different business models, which might benefit customers in unique ways.[10] Moreover, while many of these applications are offered free of

[4] *See* Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640, 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021); Compl. Utah v. Google LLC, No. 3:21-cv-05227-JD (N.D.C.A. Nov. 1, 2021).
[5] *Epic*, 2021 WL 4128925, at *3; *Utah* at 54.
[6] *Epic*, 2021 WL 4128925, at *20.
[7] *Id.* at *21.
[8] *Id.* at *20.
[9] *Utah* at 29-44.
[10] *Epic*, 2021 WL 4128925 at *64, *67-*68; *Utah* at 53 ("Google's . . . conduct harms consumers by . . . impeding competition among app distributors, which would otherwise innovate new models of app distribution and offer consumers alternatives . . . .").

charge, these policies are alleged to have increased app prices by artificially inflating Apple's and Google's commissions on purchases made through the app store.[11]

2. Aftermarket for App Distribution Through Each OS

Both sets of allegations depend on plaintiffs establishing that app distribution on Apple's or Google's OS are aftermarkets in which these companies possess market power. Indeed, the most recent lawsuits prosecuting this conduct pursued this strategy: in *Epic v. Apple*, the District Court determined that plaintiffs alleged a foremarket of Apple's iOS and aftermarkets of iOS app distribution iOS in-app payment processing,[12] while in *Utah v. Google*, plaintiffs have alleged a foremarket of mobile phone sales and an aftermarket of app distribution on Google's OS.[13]

These lawsuits offer helpful examples demonstrating the strategy plaintiffs must pursue to successfully plead an aftermarket theory. As with all attempts to define an antitrust market, plaintiffs must allege a market that matches the economic realities of the industry.[14] The plaintiff in *Epic* consequently failed to show that iOS app distribution was an aftermarket of Apple's iOS because they did not demonstrate that Apple's iOS was a valid foremarket.[15]

Nevertheless, Apple's and Google's different approaches to app distribution through their respective OSs demonstrate where an aftermarket theory could face hurdles. Namely, a plaintiff would likely be more successful arguing that Google possesses market power over Android app distribution than Apple does over iOS app distribution. This is because of the structure of the

[11] *Epic*, 2021 WL 4128925, at *121; *Utah* at 53.
[12] *Epic*, 2021 WL 4128925, at *30, *43.
[13] *Utah* at 23.
[14] *Cf.* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018) ("[T]he relevant market is defined as the area of effective competition. . . . But courts should combine different products or services into a single market when that combination reflects commercial realities." (cleaned up)).
[15] *Epic*, 2021 WL 4128925 at 29-30 ("In terms of substance, the Court agrees . . . that plaintiff's identification of a 'foremarket' for Apple's own operating system is "artificial." The proposed foremarket is entirely litigation driven, misconceived, and bears little relationship to the reality of the marketplace. . . . Given the Court's rejection of the foremarket theory, the aftermarket theory fails as it is tethered to the foremarket.").

Apple ecosystem. As *Newcal* reiterates, customers must not "knowingly enter into" contracts that restrict their options for downloading applications.[16] However, Apple customers are well aware of the company's closed ecosystem and inability to sideload applications, and Apple acknowledges these restrictions.[17] Apple therefore has a strong argument that customers knowingly consent to restrictions placed on app distribution when purchasing an Apple mobile device. If so, plaintiffs could not proceed with an aftermarket theory.

This contractual restriction does not exist under Google's model, therefore allowing plaintiffs to proceed to the remainder of the *Kodak* analysis. Beginning with the main holding of *Kodak*, plaintiffs must demonstrate that customers face information barriers and switching costs. Lifecycle pricing could include the cost of purchasing apps, which may be difficult to estimate as purchasing decisions change.[18] If so, customers would face information barriers that could allow Google to exploit customers in the Android app distribution market. Customers likely also face significant switching costs—the cost of Google phones are often hundreds of dollars and switching away from Android requires learning and adapting to an entirely new OS.[19] A court would likely agree that these switching costs demonstrate that Google has the incentive and ability to exercise its market power if these switching costs are higher than the supracompetitive app prices customers are alleged to accept.[20]

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[16] Newcal Indus., Inc. v. IKON Off. Sol., 513 F.3d 1038, 1048 (9th Cir. 2008).
[17] *See, e.g.*, Chris Duckett, *Tim Cook Claims Sideloading Apps Would Destroy Security and Privacy of iOS*, ZDNET (June 16, 2021), https://www.zdnet.com/article/tim-cook-claims-sideloading-apps-would-destroy-security-and-privacy-of-ios/ (summarizing an interview with Tim Cook, Apple's CEO, that discussed Apple's concerns with allowing sideloading on iOS) ; Michael Cowling & James Burt, *The Ethics of Apple's Closed Ecosystem App Store*, THE CONVERSATION (June 28, 2018, 9:53 PM), https://theconversation.com/the-ethics-of-apples-closed-ecosystem-app-store-99024 ("Unlike competing android devices, however, you can't load apps onto an iPhone unless you get them from the official App Store.");
[18] *See Utah* at 24 ("[C]onsumers cannot reliably predict all of the future apps or in-app content they may eventually purchase. Even if some consumers believe they can do so, their preferences and patterns of app usage can change over the device's life, especially as new apps and app functionalities emerge").
[19] *Id.*
[20] *See* Section II [not included in this writing sample].

While information barriers and switching costs are present in the Android app distribution market, several factors complicate this basic story. First, are information barriers sufficiently strong to satisfy *Kodak*? In *Kodak*, the Court explained that customers faced significant barriers to successful lifecycle pricing, which caused them to enter into restrictive contractual relationships that they otherwise would have avoided:

> The necessary information would include data on price, quality, and availability of [replacement parts], as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "downtime," and losses incurred from downtime.[21]

Here, the estimation of lifecycle costs appears to be simpler: customers must estimate the cost of purchasing apps and purchases within apps. Indeed, few customers spend any money making either of these classes of purchases. While Google data is not reliable, similar data in *Epic* found that 81.4 percent of Apple users did not make any purchases in the app store or in-app, and less than 0.5 percent of Apple accounts generated 53.7 percent of all app store billings.[22]

However, if plaintiffs can demonstrate that information barriers include factors that are broader than cost alone, they may still be able to satisfy this prong of *Kodak*. Customers may value the ability to sideload for reasons other than lower prices. For example, they may realize that they prefer different approaches to data protection or app review than the Google Play store offers. These reasons may be difficult to predict or forecast in the same way that Kodak's customers could not forecast lifecycle costs. Google's customers may therefore make choices that are equally as uninformed as Kodak's customers, but on different dimensions.

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[21] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 473 (1992).
[22] Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR, 2021 WL 4128925, at *28 (N.D. Cal. Sept. 10, 2021). "[M]edium spenders ($15-$450/quarter) and low spenders (<$15/quarter), constituting 7.4% and 10.8% of all Apple accounts, accounted for 41.5% and 4.9% of all App Store billing, respectively." *Id.* Moreover, 2016 study suggests that less than five percent of Android users spend money on in-app purchases monthly. *New Report on Global In-App Spending Habits Finds that Asian Consumers Spend 40% More in Apps Than The Rest of The World*, APPSFLYER (June 30, 2016), https://www.appsflyer.com/company/newsroom/pr/global-app-spending-habits-report/.

Second, plaintiffs must navigate the circuit split regarding whether a change in policy must be demonstrated. If the aftermarket analysis requires a change in policy, it may be difficult to succeed on this theory. Plaintiffs in *Utah* have not alleged that Google changed its approach to sideloading after a class of customers purchased Google phones. Therefore, courts requiring such a change would likely absolve Google of any responsibility.

Courts that accept the *Xerox* approach,[23] however, are more likely to agree that Google possess market power in the Android app distribution aftermarket. For example, the *Utah* plaintiffs allege that Google has intentionally deceived customers when describing the Play Store's "openness," and does not widely publicize their 30 percent commission on Play Store purchases.[24] This conduct certainly "undermined [customers'] ability" to understand their restricted choice in the aftermarket.[25]

Third, while they are unlikely to succeed, Google may argue that the app store is a feature of a mobile device rather than a derivative product. However, the facts explained above suggest the opposite. Numerous features of app stores demonstrate that they are a separate yet derivative product from Android-supported mobile devices, including that customers may download apps from sources other than the Play Store if they choose to and that OEMs are contractually restricted from prioritizing other app stores to the same degree as the Play Store.

Finally, Google may argue (as some academics have argued) that it is irrelevant whether plaintiffs show that the Android app distribution market is a valid aftermarket because the prices

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[23] *Xerox* holds that plaintiffs must demonstrate that information barriers "undermined [consumers'] ability to know that the aftermarket" product was supracompetitively priced *or* that there was a policy change. Xerox Corp. v. Media Scis., Inc., 660 F. Supp. 2d 535, 547 (S.D.N.Y. 2009).

[24] Compl. Utah v. Google LLC, No. 3:21-cv-05227-JD, at 24 (N.D.C.A. Nov. 1, 2021) ("Nonetheless, consumers might attempt to factor Google's conduct into their decisions to move away from Android, but Google has inhibited . . . that informed choice. Most consumers are unaware of Google's supracompetitive commissions, which Google does not publicize or itemize on its Play Store billing statements. Google likewise conceals the anticompetitive technological and contractual constraints that give the Google Play Store an unfair competitive advantage. . . .").

[25] *Id.*

customers would pay would not change with lower commissions. Professor John Yun argues that the combined effect of app stores' additive nature (i.e., they add value to customers' OS experience) and near-zero marginal cost causes this result.[26] Therefore, any antitrust regulation will not change the prices customers face.

Such an argument should not discourage antitrust enforcement. Assuming this argument is true (which is likely contested), this defense focuses solely on price impacts, despite plaintiffs' allegations that app store monopolization reduces customers' access to unique business models that could upend a commission-based app store altogether. Consequently, if plaintiffs can adequately demonstrate that information barriers and switching costs are sufficiently high, and that a change in policy is unnecessary to satisfy *Kodak*, plaintiffs are likely to prevail in demonstrating that Google possesses market power in the Android app distribution aftermarket.

B. Cloud Services

1. Relevant Facts and Conduct

A second industry that demonstrates the many questions that arise when applying *Kodak* to digital platforms is cloud services. Cloud services platforms allow companies to rent server infrastructure for storage, computation, and networking of data. The cloud infrastructure market is dominated worldwide by four companies: Amazon (through its Amazon Web Services ("AWS") platform), Alibaba (although Alibaba's presence in the United States is small), Microsoft (through its Microsoft Azure platform), and Google (through its Google Cloud Platform ("GCP") product), with AWS commanding by far the largest market share.[27]

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[26] Yun, *supra* note 1, at 33-34.
[27] *Gartner Says Worldwide IaaS Public Cloud Services Market Grew 40.7% in 2020*, GARTNER (June 28, 2021), https://www.gartner.com/en/newsroom/press-releases/2021-06-28-gartner-says-worldwide-iaas-public-cloud-services-market-grew-40-7-percent-in-2020; Alexandra Alper, *Exclusive: U.S. Examining Alibaba's Cloud Unit for National Security Risks – Sources*, REUTERS (Jan. 19, 2022, 2:58 PM), https://www.reuters.com/technology/exclusive-us-examining-alibabas-cloud-unit-national-security-risks-sources-

Supplementary to cloud infrastructure services, these companies also offer numerous proprietary and third-party software services specific to the platform's configuration to perform additional tasks. Such services include, for example, database software, machine learning tools, data recovery software, and content delivery networks.[28] Many companies (*i.e.*, independent software vendors, or "ISVs") produce services that compete with each cloud infrastructure platform's own proprietary services. For example, Cloudflare, a company focused on cloud networking, offers a content delivery network ("CDN") that cloud customers may rely on instead of a cloud infrastructure platform's own CDN.[29]

According to the House of Representatives, some ISVs in the markets for these supplementary services have complained about various conduct by AWS.[30] These concerns focus on three features of the industry: data egress fees, contracting structure, and product development. Data egress fees are the fees cloud providers charge for sending data to different classes of recipients.[31] While cloud providers do not charge customers for transferring data *into* its cloud infrastructure, they do charge a small fee for transferring data to different geographic regions within their networks and a larger fee for transferring data outside their networks.[32] The

2022-01-18/ ("Alibaba's U.S. cloud business is small, with annual revenue of less than an estimated $50 million, according to research firm Gartner Inc.").

[28] *See Cloud Products*, AMAZON WEB SERVICES, https://aws.amazon.com/products for a complete list of AWS's supplementary services.

[29] *See* Cloudflare, https://www.cloudflare.com/.

[30] *See* MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMIN. LAW, 116TH CONG., INVESTIGATION OF IN DIGITAL MARKETS, MAJORITY STAFF REP. AND RECOMMENDATIONS (2020). While competitors have voiced complaints about cloud providers' conduct, many customers are often ambivalent or enthusiastic about recent developments in the cloud industry. *See* Tom Krazit, *AWS Has Avoided Antitrust Scrutiny So Far. Here's How That Could Change.*, PROTOCOL (Feb. 12, 2021), https://www.protocol.com/enterprise/aws-amazon-cloud-antitrust ("Given that so far most cloud customers have been happy to move their data into the new services provided by the Big Three, complaints about egress fees mainly come from companies that want to use more than one cloud provider.").

[31] *See Overview of Data Transfer Costs for Common Architectures*, AMAZON WEB SERVICES (June 30, 2021), https://aws.amazon.com/blogs/architecture/overview-of-data-transfer-costs-for-common-architectures/ (describing AWS's egress fee structure); *Bandwidth Pricing*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/pricing/details/bandwidth/#pricing (last visited Jan. 17, 2021).

[32] Data is stored within a specific AWS Region, and egress fees are incurred when data is transferred to a different AWS region. *See supra* note 31.

House report and public complaints by Cloudflare suggest that this fee structure not only allows cloud providers to anticompetitively lock customers in to its cloud infrastructure products.[33]

Second, some have argued that cloud providers' contracting practices illegally favor proprietary products.[34] Long-term contracts, which the House of Representatives has found often last three to five years and which an exemplar contract has shown are often accompanied with pricing concessions in return for minimum spending commitments, may prevent companies that provide these supplementary services from competing for customers.[35]

Finally, critics have complained that cloud providers rely upon their control over cloud infrastructure services to determine which third-party services to copy.[36] Companies have publicly characterized this conduct as "strip-mining" open-source ISVs for cloud providers' gain, which may be successful because of previously-mentioned contracting practices.[37] Such conduct may help cloud providers gain market power in nascent markets for supplementary services.

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[33] *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 30, at 119; Thomas Claburn, *Cloudflare Slams AWS Egress Fees to Convince Web Giant to Join its Discount Data Club*, THE REGISTER (July 24, 2021, 12:07 AM), https://www.theregister.com/2021/07/24/cloudflare_aws_egress_fees/ ("[T]his pricing model deters companies dependent on AWS from choosing to move their data and business elsewhere, even though Google and Microsoft also charge for data egress. 'The only rationale we can reasonably come up with . . .: locking customers into their cloud, and making it prohibitively expensive to get customer data back out,' they said.").

[34] *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 30, at 118 ("Subcommittee staff has identified several common techniques infrastructure providers use to initially lock-in customers, including contract terms, free tier offerings, and egress fees. The first is long-term contracts. In several responses to the Committee's requests for information, third parties explained they have contracts lasting from 3-to-5 years with the infrastructure providers."); Greg Noone, *Is the cloud computing market anti-competitive?*, TECH MONITOR (Jan. 13, 2022), https://techmonitor.ai/technology/cloud/is-cloud-computing-market-anti-competitive-antitrust ("Other anti-competitive practices cited by critics . . . include overly long contracts, bundling – in which software packages are combined with infrastructure provision at a lower premium, pricing IaaS-only providers out of the market – and self-preferencing, which can see new and complex licensing requirements and audits imposed on customers who abstain from buying said bundle.")

[35] *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 30, at 118; Krazit, *supra* note 30; AWS Enterprise Discount Program Addendum, https://www.sec.gov/Archives/edgar/data/1576914/000162828017007056/exhibit421-mixawsaddenduma.htm.

[36] *See id.* ("Self-preferencing can take on several forms. Data is one: AWS has an enormous amount of data on how its customers are using both its own and third-party cloud services on its platform, and critics have charged that it can use that data to launch competing services."); Tom Krazit, *'It's Not OK': Elastic Takes Aim at AWS, at The Risk of Major Collateral Damage*, PROTOCOL (Jan. 21, 2021), https://www.protocol.com/enterprise/about/aws-targeted-by-elastic (describing the response Elastic, a caching service, took to protect its open-source product from copying).

[37] *See, e.g.*, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 30, at 120; Daisuke Wakabayashi, *Prime Leverage: How Amazon Wields Power in the Technology World*, THE NEW YORK TIMES (Dec. 16, 2019),

2. Aftermarkets for Platform-Specific Supplementary Services

The previously mentioned conduct implicates monopolization of various markets for supplementary services on each platform (i.e., database services provided through Azure), in addition to claims of monopolization in the infrastructure market itself. Whether a plaintiff could successfully allege that a cloud services platform could exercise market power in the aftermarket for software services specific to the platform turns on many of the issues discussed previously.

First, potential plaintiffs must demonstrate the core *Kodak* factors. Cloud customers may face barriers to determining the lifecycle costs of cloud services, as customers may be unable to forecast future demand for storage and computational services in addition to future demand for supplementary services. Egress fees also increase the unpredictability of future cloud costs. Similarly, switching costs could be significant. The House report outlines multiple sources of switching costs: (a) egress fees from transferring a customer's data from one cloud infrastructure platform to another, and (b) adapting a customers' code base to a new platform, due to the high cost of contractual commitments to cloud providers and the technical challenge of adapting a customer's data infrastructure to a new cloud provider.[38]

However, plaintiffs alleging a platform-specific cloud software services aftermarket must clear several hurdles to satisfy the *Kodak* doctrine. First, traditional switching costs may be low if cloud infrastructure services are offered on a subscription basis. But two features of cloud infrastructure purchasing vitiate this concern: (a) customers that agree to long-term deals must pay cloud providers their spending commitment whether or not they would like to switch to

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https://www.nytimes.com/2019/12/15/technology/amazon-aws-cloud-competition.html; Ben Thompson, *AWS, MongoDB, and the Economic Realities of Open Source*, STRATECHERY (Jan. 24, 2019), https://stratechery.com/2019/aws-mongodb-and-the-economic-realities-of-open-source/.

[38] INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 30, at 118-119.

another provider,[39] and (b) as recognized in *Dealer Management Systems*, switching costs in this context encompass a broader range of costs than simply price—including the time and money it takes to transition to a new system.[40]

Second, courts may be wary of accepting an aftermarket theory for supplementary services if a cloud provider did not force customers to use its proprietary services after customers agreed to purchase the core infrastructure. Because customers sign long-term contracts that likely require significant negotiation, courts may be inclined to believe that customers are aware of the limitations placed on them at the time of signing.[41] Indeed, it appears that cloud providers may in fact *help* customers calculate the lifecycle costs of using its infrastructure by providing a calculator for this purpose.[42] Unless a plaintiff could uncover evidence that cloud providers have increased its self-preferencing in an aftermarket for customers already on their platform, these facts would likely fail to prove an aftermarket where courts require a change in policy.

A plaintiff may face similar difficulties under the more lenient *Newcal*/*Xerox* approach. The above facts suggest that customers may "knowingly enter into" restrictive contracts when they agree to long-term contracts that bundle all products together.[43] However, courts may be more receptive to an aftermarket theory if a plaintiff can demonstrate that despite their long-term contracts and ability to seek assistance when calculating cloud costs, customers *still* cannot estimate lifecycle costs. For example, AWS's calculator may be insufficiently precise to accurately forecast infrastructure usage and which supplementary services a customer may need, particularly as cloud technology and customers' business models evolve. This, combined with

[39] *See* supra note 35.
[40] *See supra* note [corresponding paragraph is not included in this writing sample].
[41] *See* Section II.A [not included in this writing sample].
[42] *See e.g.*, Calculator, AMAZON WEB SERVICES, https://calculator.aws/.
[43] *See* Newcal Indus., Inc. v. IKON Off. Sol., 513 F.3d 1038, 1048 (9th Cir. 2008).

complaints that cloud providers obscures the degree to which its services are different than ISV competitors, may satisfy a court that information barriers are sufficiently high.[44]

Cloud providers would likely argue that sophisticated customers discipline prices across the cloud ecosystem.[45] It is possible that customers who negotiate the largest contracts with the cloud providers inform the entire market. Indeed, the recent complaints about AWS's allegedly excessive data egress fees caused AWS to expand the volume of data that could be transferred without charge.[46] However, most of these contracts appear to be confidential—therefore limiting the information unsophisticated customers may gain from these negotiations—and AWS's response might only be lip-service. Such complications must be resolved by a court.

Moreover, individualized contracting may allow cloud providers to price discriminate between sophisticated and unsophisticated customers, therefore preserving cloud providers' ability to exploit some customers.[47] It is unclear what percentage of cloud providers' customers negotiate individualized contracts that specify contract length and spending commitments. However, it may be profitable for cloud providers to impose supracompetitive prices on customers that do not negotiate their own contracts if the profit from doing so outweighs any reputational costs or lost business these providers would suffer.

Third, courts may not consider the alleged aftermarket services to be derivative of cloud infrastructure services if customers could obtain the services specific to the platform outside of the platform's ecosystem (e.g., security services that operate on multiple cloud providers). Recently, some customers have expressed an interest in being able to use multiple cloud

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[44] *Cf.* notes 24-25 and accompanying text.
[45] *See* Eastman Kodak Co. v. Image Tech. Svcs., Inc., 504 U.S. 451, 473-475 (1992) (describing Kodak's argument that education by sophisticated customers or price discrimination would vitiate any information barriers).
[46] Paul Sawers, *Amazon's AWS Expands Free 'Egress' Data Transfer Limits*, VENTUREBEAT (Nov. 25, 2021, 10:43 AM), https://venturebeat.com/2021/11/25/amazons-aws-expands-free-egress-data-transfer-limits/.
[47] *See Kodak*, 504 U.S. at 475.

providers at once (this is known as a "multicloud" strategy), and ISVs have developed products to facilitate a multicloud approach.[48] For example, customers may be able to use a database software that is easily portable to a different platform's cloud infrastructure. If so, these potential aftermarket products may not satisfy the *Newcal* requirement that the aftermarket "would not exist without" the foremarket.[49] However, there is some evidence that even those products that allow for a multicloud approach require some customization to each providers cloud infrastructure.[50] Moreover, even those customers that adopt a multicloud strategy often avoid splitting a single task across different clouds.[51] These features suggest that while an aftermarket service may be accessible on a platform other than that which a customer uses for infrastructure, customers may not consider those options as realistic.

These complications demonstrate that a plaintiff wanting to bring an antitrust lawsuit against a cloud platform on an aftermarket theory must clear many factual hurdles. While this theory is not impossible, it faces multiple obstacles that plaintiffs in the app store cases do not.

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[48] *See, e.g.*, Belle Lin, *10 Amazon Cloud Partners Explain How They Built Thriving Businesses While Working With a Juggernaut That's Never Been Afraid to Compete with Its Own Allies*, INSIDER (July 10, 2021, 10:07 AM), https://www.businessinsider.com/aws-partners-rely-on-amazon-web-services-competition-startups-2021-4 ("Among other benefits, the so-called multi-cloud trend means companies can pick and choose services from multiple cloud providers, while also catering to customers that might want to use their service on other platforms."); Krazit, *supra* note 30 (noting that companies seeking a multicloud approach have complained about cloud providers' conduct); Brent Ellis, *Multicloud is Hard, But Single-Cloud Failures Make it Necessary for Enterprises*, FORRESTER (Dec. 7, 2021), https://www.forrester.com/blogs/multicloud-is-hard-but-single-cloud-failures-make-it-necessary-for-enterprises/.

[49] Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1049 (9th Cir. 2008).

[50] *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 30, at 119 ("Several market participants spoke to the challenges of finding cloud developers that know the underlying technology of multiple cloud infrastructures as a barrier to both switching, either from one cloud to another or to set up multi-cloud operations. As one third party describes, 'businesses often have to calibrate a complex set of technical frameworks, settings, and customized interfaces to adapt their business to the potentially unique way the cloud storage provider has chosen to operate their service.'"); Krazit, *supra* note 30 ("But companies that want to implement multicloud strategies also suffer from the fact that each cloud provider has a slightly different way of doing things, and there can be quite a learning curve when an AWS shop tries to get up and running on Microsoft Azure, and vice versa.").

[51] Shaun O'Meara, *Multicloud Challenges and Solutions*, THE NEW STACK (Mar. 24, 2021, 9:00 AM), https://thenewstack.io/multicloud-challenges-and-solutions/ ("The most common and simplest model involves separating the components (application layers) so that each distinct component is deployed on a single provider, with the whole application spread across multiple clouds.").

Applicant Details

First Name	**Luke**
Last Name	**Ross**
Citizenship Status	**U. S. Citizen**
Email Address	**lwr2110@columbia.edu**
Address	**Address** Street **44 West 69th Street #3B** City **New York** State/Territory **New York** Zip **10023** Country **United States**
Contact Phone Number	**6463881487**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**December 2015**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 10, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Fagan, Jeffrey
jeffrey.fagan@law.columbia.edu
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McCrary, Justin
jrm54@columbia.edu
Bobbitt, Philip
bobbitt@law.columbia.edu
212-854-4090

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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February 28th, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007

Dear Judge Liman:

I am a third-year student at Columbia Law School writing to apply for a clerkship in your chambers beginning in 2024. As a native New Yorker interested in serving as an Assistant U.S. Attorney before pursuing a career in complex litigation, I find the prospect of clerking in your chambers particularly appealing. I believe my litigation experience prior to law school, upcoming work at Sullivan & Cromwell, and passion for legal analysis and writing make me well-suited for a district court clerkship.

Enclosed please find my resume, transcripts, and writing sample. Also enclosed are letters of recommendation from Professors Bobbitt (212 854-4090, pbobbi@columbia.edu), Fagan (212 854-2624, jaf45@columbia.edu), and McCrary (212 854-7992, jmccrary@columbia.edu). Please also see the following link to my daily newsletter where I summarize and comment upon recent decisions in the First, Second, and Third Circuits (https://123digest.substack.com).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Luke Ross

Luke Ross

LUKE ROSS

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New York, NY 10023
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EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2022
Honors: Hamilton Fellowship (full-tuition scholarship)
James Kent Scholar, Harlan Fiske Stone Scholar
Activities: *Columbia Business Law Review*, Articles Editor
Extern at Squire Patton Boggs' Public Service Initiative, Capital Litigation (2021-2022)
Teaching Assistant for Professor Justin McCrary, Antitrust (Spring 2022)
Teaching Assistant for Professor Robin Effron, Civil Procedure (Fall 2020)
Academic Coach, Civil Procedure, Constitutional Law, and Property (2020-2022)

Washington University, St. Louis, MO
B.A. in Political Science (College Honors), received Dec. 2015
Honors: Phi Beta Kappa
Arnold J. Lien Prize (Outstanding Senior in Political Science)
Activities: Varsity Club Golf
Study Abroad: King's College London, London, UK, Spring 2015 (recipient of Excellence Scholarship)

EXPERIENCE

Sullivan & Cromwell, New York, NY
Summer Associate Summer 2021
Accepted offer to return as litigation associate in fall 2022.

Balestriere Fariello, New York, NY
Legal Apprentice Summer 2020
Wrote complaints alleging breaches of fiduciary duty by directors of several Fortune 500 companies and alleging self-dealing by broker-dealers at a wealth management firm. Attended depositions and analyzed and organized discovery documents for complex litigation matters. Conducted legal research regarding several state and federal law questions, including employer exposure to COVID-related litigation and the applicability of the California franchise tax to business conducted out-of-state.

Analysis Group, Inc., Boston, MA
Senior Analyst July 2018 – July 2019
Developed individualized inquiry arguments to assert the prevalence of uninjured class members in several proposed plaintiff classes. Analyzed and rebutted plaintiffs' damages models in generic product-hop litigations. Served as a formal mentor to a group of incoming analysts and co-developed an analyst training program in report drafting and formatting.

Analyst June 2016 – July 2018
Conducted quantitative and qualitative economic analyses to support experts in complex litigation. Performed analyses of the anticompetitive nature of the U.S. health insurance market in support of a Justice Department motion to block a merger between two national health insurers. Developed estimates of market share of non-oncology products based on user inputs related to their clinical and order-of-entry attributes.

INTERESTS: Fiction and legal writing, golf, tennis, and chess

Columbia
Law School

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CLS TRANSCRIPT (Unofficial)

02/02/2022 03:20:09

Program: Juris Doctor

Luke W Ross

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6635-2	Columbia Business Law Review Editorial Board		1.0	
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	
L6474-1	Law of the Political Process	Greene, Jamal	3.0	
L8868-1	S. The American Bail System	Funk, Kellen Richard	2.0	
L6822-1	Teaching Fellows	McCrary, Justin	3.0	

Total Registered Points: 12.0

Total Earned Points: 0.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6635-2	Columbia Business Law Review Editorial Board		1.0	CR
L6791-1	Ex. Constitutional Rights in Life and Death Penalty Cases	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	A
L6791-2	Ex. Constitutional Rights in Life and Death Penalty Cases - Fieldwork	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	CR
L6425-1	Federal Courts	Kent, Andrew	4.0	A
L8082-1	S. American Jurisprudence: Judicial Interpretation and The Role of Courts [Minor Writing Credit - Earned]	Sullivan, Richard	2.0	A-

Total Registered Points: 11.0

Total Earned Points: 11.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6502-1	Advanced Criminal Law: The Death Penalty	Fagan, Jeffrey A.	3.0	A-
L6635-1	Columbia Business Law Review		0.0	CR
L6231-2	Corporations	McCrary, Justin	4.0	A-
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6274-3	Professional Responsibility	Gupta, Anjum	2.0	A-
L6683-1	Supervised Research Paper	Khan, Lina	1.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	A+
L6635-1	Columbia Business Law Review		0.0	CR
L9281-1	Constitutional Interpretation	Bobbitt, Philip C.	4.0	A
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	A-
L6675-1	Major Writing Credit	Khan, Lina	0.0	CR
L6683-1	Supervised Research Paper	Khan, Lina	2.0	A
L6822-1	Teaching Fellows	Effron, Robin	3.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6410-1	Constitution and Foreign Affairs	Damrosch, Lori Fisler	3.0	CR
L6133-3	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	CR
L6108-3	Criminal Law	Liebman, James S.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-1	Legal Practice Workshop II	Harwood, Christopher B	1.0	CR
L6118-1	Torts	Blasi, Vincent	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.; Louk, David S	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	A
L6105-5	Contracts	Katz, Avery W.	4.0	B+
L6113-2	Legal Methods	Sovern, Michael I.	1.0	CR
L6115-1	Legal Practice Workshop I	Harwood, Christopher B; Neacsu, Dana	2.0	P
L6116-2	Property	Balganesh, Shyamkrishna	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 83.0

Total Earned JD Program Points: 71.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L
2019-20	Harlan Fiske Stone	1L

Washington University Unofficial Transcript for: **Luke Weigley Ross**
Student ID Number: 425525
Student Record data as of: 6/7/2021 12:50:55 PM

HOLDS - no records of this type found

DEGREES AWARDED

MINOR IN CLASSICS	Dec 16, 2015
MINOR IN WRITING	Dec 16, 2015
A.B. MAJOR IN POLITICAL SCIENCE	Dec 16, 2015

MAJOR PROGRAMS

---------Semester---------				Prime	
Admitted	**Terminated**	**Status**	**Code**	**or Joint**	**Program**
SP2013	FL2015	Completed	LA3201	Prime	A.B. MAJOR IN POLITICAL SCIENCE
FL2014	FL2015	Completed	LA14M2	Joint	MINOR IN WRITING
FL2012	SP2013	Closed	LA0001	Prime	A.B. UNDECLARED MAJOR
SP2014	FL2015	Completed	LA08M1	Joint	MINOR IN CLASSICS

ADVISORS

Advisor	Advisor Type	Start Dt	End Dt	Program	Email
William Stanley Bubelis	Faculty Advisor	2/4/2015	1/22/2016	LA08M1 MINOR IN CLASSICS	wbubelis@WUSTL.EDU
J. Dillon Brown	Faculty Advisor	9/29/2014	1/22/2016	LA14M2 MINOR IN WRITING	jdbrown@WUSTL.EDU
Justin Fox	Faculty Advisor	5/9/2014	1/22/2016	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	justin.fox@wustl.edu
George M. Pepe	Faculty Advisor	12/30/2013	2/4/2015	LA08M1 MINOR IN CLASSICS	GPEPE@WUSTL.EDU
Ryan Moore	Faculty Advisor	5/9/2013	5/9/2014	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	rtm@artsci.wustl.edu
Kristin H Kerth	A&S Four Year Advisor	7/9/2012	1/22/2016		kkerth@artsci.wustl.edu

SEMESTER COURSEWORK AND ACADEMIC ACTION

Note: Courses dropped with a status of 'D' will not appear on your transcript.
Courses dropped with a status of 'W' will appear on your transcript.

FL2012

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L10 Latin	3171	01	3.0	C	A	A				Survey of Latin Literature: The Republic
L11 Econ	1011	01	3.0	C		A				Introduction to Microeconomics
L14 E Lit	201C	02	3.0	C		A				Text and Tradition
L32 Pol Sci	101B	01	3.0	C		A+				American Politics
L32 Pol Sci	101B	A	0.0							American Politics
L32 Pol Sci	106	01	3.0	C		A				Introduction to Political Theory
L32 Pol Sci	106	A	0.0							Introduction to Political Theory

Enrolled Units: 15.0 **Semester GPA:** 4.00 **Cumulative Units:** 24.0 **Cumulative GPA:** 4.00

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

SP2013

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L10 Latin	3181	01	3.0	C		A				Survey of Latin Literature: The Empire
L19 EPSc	111	01	3.0	C		A				Introduction To Global Climate Change In the 21st Century
L32 Pol Sci	3325	01	3.0	C		A				Topics in Politics: Constitutional Politics in the U.S.
L59 WRIT	100	38	3.0	C	A-	A				College Writing 1

Enrolled Units: 12.0 **Semester GPA:** 4.00 **Cumulative Units:** 36.0 **Cumulative GPA:** 4.00

MSN 8102 SPRING WRITING PLACEMENT, Approved to enroll in Writing 1 **Transcript:** No **Expires** 12/31/2999

MSN 8110 WRITING 1 REQUIREMENT STATUS, Satisfied **Transcript:** No **Expires** 12/31/2999

FL2013

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L10 Latin	419	01	3.0	C		A				Julius Caesar and His Image
L31 Physics	125A	01	3.0	C		A				Solar System Astronomy
L32 Pol Sci	363	01	3.0	C		A-				Quantitative Political Methodology

L32 Pol Sci	363	C	0.0							Quantitative Political Methodology
L32 Pol Sci	399	01	3.0	C		A				Topics in Politics: Elections and Representation
L48 Anthro	150A	01	3.0	C		A				Introduction to Human Evolution

Enrolled Units: 15.0 **Semester GPA:** 3.94 **Cumulative Units:** 51.0 **Cumulative GPA:** 3.98

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

SP2014

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L08 Classics	200C	01	3.0	C		A				World Archaeology: Global Perspectives on the Past
L11 Econ	1021	01	3.0	P		CR#				Introduction to Macroeconomics
L16 Comp Lit	375	01	3.0	C		A				Topics in Comparative Literature I: After the End Post-Conflict Cultures in Comparison
L32 Pol Sci	3326	01	3.0	C	A-	A				Topics in Politics: Comparative Political Parties
L32 Pol Sci	3551	01	3.0	C		A				The Welfare State and Social Policy in America

Enrolled Units: 15.0 **Semester GPA:** 4.00 **Cumulative Units:** 66.0 **Cumulative GPA:** 3.98

FL2014

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
F20 ART	2363	01	3.0	C		A				Advertising in the Digital Age
L13 Writing	221	02	3.0	C		A				Fiction Writing 1
L32 Pol Sci	3055	01	3.0	C		A				The Comparative Study of Legislative Institutions
L32 Pol Sci	419	32	3.0	C		A+				Teaching Practicum in Political Science
L32 Pol Sci	495	01	3.0	C		A				Research Design and Methods
L99 OSP	101	01	0.0	P		CR#				Study Abroad 101
U11 EComp	310	01	3.0	C		A				Genre Writing

Enrolled Units: 18.0 **Semester GPA:** 4.00 **Cumulative Units:** 84.0 **Cumulative GPA:** 3.99

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

SP2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L99 OSP	7002	01	0.0	C		N				Overseas Program: King's College London, UK

Enrolled Units: 0.0 **Semester GPA:** 0.00 **Cumulative Units:** 100.0 **Cumulative GPA:** 3.99

HON 0002 PHI BETA KAPPA **Transcript:** Yes **Expires** 12/31/2999

SU2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L32 Pol Sci	4001	09	3.0	C		A-				American Democracy and the Policy-Making Process
L43 GeSt	2993	09	3.0	P		CR#				D.C. Internship

Enrolled Units: 6.0 **Semester GPA:** 3.70 **Cumulative Units:** 106.0 **Cumulative GPA:** 3.98

FL2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L13 Writing	224	01	3.0	C		A-				Playwriting
L13 Writing	312	03	3.0	C		A-				ARGUMENTATION
L13 Writing	321	02	3.0	C		B				Fiction Writing 2
L14 E Lit	365	01	3.0	C		A				The Bible as Literature
L30 Phil	331F	01	3.0	C		B+				Classical Ethical Theories

Enrolled Units: 15.0 **Semester GPA:** 3.54 **Cumulative Units:** 121.0 **Cumulative GPA:** 3.90

HON 0039 COLLEGE HONORS IN A&S **Transcript:** Yes **Expires** 12/31/2999

HON 0185 ETA SIGMA PHI - CLASSICS HONOR SOCIETY **Transcript:** Yes **Expires** 12/31/2999

SP2016

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**

Enrolled Units: 0.0 **Semester GPA:** 0.00 **Cumulative Units:** 121.0 **Cumulative GPA:** 3.90

HON 0281 ARNOLD J. LIEN PRIZE FOR OUTSTANDING GRADUATING SENIOR IN POLITICAL SCIENCE **Transcript:** Yes **Expires** 12/31/2999

OTHER CREDITS

					---------Units---------			Dean Req.			
Semester	**Dept**	**Course**	**SIS**	**Title**	**Type**	**Units**	**AP**	**Design**	**Topics**	**Code Met**	**Sci**	**Comments**
SP2015	L08	375		Topics in Classics		3.00						King's College London, University of London

							(KCL)/London, United Kingdom
School:				**Other Title:**			**Original Grade:**
FL2012	L13	0001	ENGLISH COMPOSITION ELECTIVE	0.00	3.00		Advanced Placement
School:				**Other Title:**			**Original Grade:**
FL2012	L22	0001	HISTORY ELECTIVE	0.00	3.00		Advanced Placement
School:				**Other Title:**			**Original Grade:**
FL2012	L22	163	Freedom, Citizenship, and the Making of American Life	0.00	3.00		Advanced Placement
School:				**Other Title:**			**Original Grade:**
FL2012	L43	9999	Total Credit Granted By Prematriculation Units	9.00			
School:				**Other Title:**			**Original Grade:**
SP2015	L99	0001	Other Coursework Taken Abroad	1.00			King's College London, University of London (KCL)/London, United Kingdom
School:				**Other Title:**			**Original Grade:**
SP2015	L99	101H	Overseas Program: Humanities Coursework Taken Abroad	4.00			King's College London, University of London (KCL)/London, United Kingdom
School:				**Other Title:**			**Original Grade:**
SP2015	L99	101S	Overseas Program: Social Science Coursework Taken Abroad	8.00			King's College London, University of London (KCL)/London, United Kingdom
School:				**Other Title:**			**Original Grade:**

GPA SUMMARY

	Semester Units						Cumulative Units					Level	GPA		
Semester	**Cr. Att.**	**Cr. Earn**	**P/F Att.**	**P/F Earn**	**Trans.**	**Grade Pts.**	**Cr. Att.**	**Cr. Earn**	**P/F Att.**	**P/F Earn**	**Trans.**	**Units**	**Sem.**	**Cum.**	**Level**
FL2012	15.0	15.0	0.0	0.0	9.0	60.0	15.0	15.0	0.0	0.0	9.0	24.0	4.00	4.00	2
SP2013	12.0	12.0	0.0	0.0	0.0	108.0	27.0	27.0	0.0	0.0	9.0	36.0	4.00	4.00	3
FL2013	15.0	15.0	0.0	0.0	0.0	167.1	42.0	42.0	0.0	0.0	9.0	51.0	3.94	3.98	4
SP2014	12.0	12.0	3.0	3.0	0.0	215.1	54.0	54.0	3.0	3.0	9.0	66.0	4.00	3.98	5
FL2014	18.0	18.0	0.0	0.0	0.0	287.1	72.0	72.0	3.0	3.0	9.0	84.0	4.00	3.99	6
SP2015	0.0	0.0	0.0	0.0	16.0	287.1	72.0	72.0	3.0	3.0	25.0	100.0	0.00	3.99	7
SU2015	3.0	3.0	3.0	3.0	0.0	298.2	75.0	75.0	6.0	6.0	25.0	106.0	3.70	3.98	8
FL2015	15.0	15.0	0.0	0.0	0.0	351.3	90.0	90.0	6.0	6.0	25.0	121.0	3.54	3.90	8

ENROLLMENT STATUS

Semester	Start	End	Enrollment Status	Level	Units	Status Change Date
FL2012	8/28/2012	12/19/2012	Full-Time Student	1	15.0	
SP2013	1/14/2013	5/17/2013	Full-Time Student	3	12.0	
FL2013	8/27/2013	12/18/2013	Full-Time Student	3	15.0	
SP2014	1/13/2014	5/16/2014	Full-Time Student	5	15.0	
FL2014	8/25/2014	12/17/2014	Full-Time Student	5	18.0	
SP2015	1/12/2015	5/6/2015	Full-Time Student	6	16.0	
SU2015	5/18/2015	8/13/2015	Half-Time Student	6	6.0	
FL2015	8/24/2015	12/16/2015	Full-Time Student	8	15.0	

DEMOGRAPHICS

Birthdate: 4/30/1994
Birth Place: New York NY
Date of Death:

Gender: M
Marital Status:

Race: 6 - White (Non-Hispanic Origin)

Hispanic: N
American Indian: N

Semester of Entry: FL2012
Entry Status: F
Anticipated Deg Dt: 2016
Std Expt Graduation:
Frozen Cohort: FR2016LA

Veteran Code:
Locale: 0
U.S. Citiz en: Y
Country: USA
Visa Type:
Nonresident Alien: N

Asian: N
Black: N
Hawaiian
Pacific: N
White: Y
Not Reported: N

Faculty/Staff Child:
Alumni Code:
Prof. School1: PL
Prof. School2:
Area of Interest:
Area of Interest Code: 3208PL

ADMINISTRATIVE CODES

Type	Value
Personal Email Address	lukeross123@gmail.com

HIGH SCHOOL

Name	Code	GPA	Weight	Class Siz e	Class Rank
Trinity School	334090	3.50			

PREVIOUS SCHOOLS - no records of this type found

UNIVERSITY EMAIL ADDRESS: luke.ross@wustl.edu **FORWARDS TO:** luke.ross@go.wustl.edu

Columbia Law School

February 28, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Re: ***Recommendation for Luke Ross***

Dear Judge Liman:

It's a pleasure to recommend Luke Ross for a clerkship in your chambers. Luke was my student in Spring 2021 in an advanced criminal law course on the death penalty. Luke excelled in the course. He was an intellectual leader in class. His interrogations of the material prompted other students (normally reticent) to engage in debate that challenged the historical trajectory of caselaw and pre-vailing Supreme Court doctrine. He skillfully argued both sides of controversial opinions, at times siding with dissenterds and at other times with a majority. His written exam included a Swiftian challenge to prevailing jurisprudence in the form of proposal for a sharp revision of doctrine to rescue the death penalty from what he characterizes as its inevitable demise. Intellectual depth and courage marked his recurring contributions to class discussion. It was a pleasure to teach him, to see a legal scholar growing over the course of the semester, and to engage with him in debate on difficult ques-tions.

Beyond our discussions in class, Luke was a regular visitor to (video) office hours to continue his en-gagement with the material. He pushed hard in those private conversations on the Court's dicta, and yet he was able to debate with himself (and me) on his own views. He incorporated empirical facts into his analysis of caselaw, often challenging what he saw as an inadequate engagement by the Court's engagement with those facts (His empirical skills shone in those instances). His analysis was sharp, informed, balanced, and clearly articulated as if he were arguing in Court. I can imagine the same approach to cases on your docket, with contributions that will challenge both sides of an argu-ment.

A few other comments on Luke. His record in his first four semesters of law school suggests that my colleagues saw the same legal capital that I did. His experience in litigation during summer place-ments suggests that he is more than comfortable with empirical evidence, which sets him apart from his colleagues. He is a poker player, a skill that may be valuable in the analysis of litigation and the contests in both trial and appellate law. He is a fine writer. His recognitions in our law school include a Stone Scholar recognition and a Hamilton Fellowship, both extremely competitive awards.

Not only is Luke one of the best students I have taught, he also is one of the most interesting and lik-able students I have encountered. He has my enthusiastic recommendation for a challenging and productive clerkship. Please feel free to contact me should you need additional perspective on his work and his skills.

Yours truly,

Jeffrey Fagan
Isidor and Seville Professor of Law
Professor of Epidemiology, Mailman School of Public Health

Jeffrey Fagan - jeffrey.fagan@law.columbia.edu - 212-854-2624

February 28, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to recommend Luke Ross as a judicial clerk. He has distinguished himself as an especially bright, curious, and well-rounded student and thinker. His performance in my Antitrust and Corporations classes speaks to his ability to grasp complex legal concepts, recognize nuance, and express his understanding in a clear and persuasive fashion. Luke is without a doubt one of the best students I have ever had in my Antitrust class, for which he received an "A+". He was an active participant in class panels and discussions and was always willing and able to help his classmates understand difficult concepts. He was also very enthusiastic about the course material and attended my office hours regularly to discuss contemporary issues in antitrust law. It was through his participation in my Antitrust class last fall and our lively discussions outside of the classroom that I came to know Luke.

Luke's work outside my classroom further demonstrates his unique strengths as a legal writer and researcher. His Note arguing for enhanced judicial scrutiny of antitrust consent decrees, which he sent to me for feedback, is written with the precision of a technician and the depth of thought of a serious intellect. In the Note, Luke demonstrates an incredible fluency with the details of the Tunney Act, its historical context, and its modern applications while nevertheless crafting a far-reaching argument capable of addressing fundamental disputes about the nature of public interest in antitrust law and the limits of judicial prerogative. It is also a great display of Luke's creativity. In the face of an ossified debate over whether to sacrifice the democratically mandated spirit of the Tunney Act or our Constitution's separation of powers, Luke innovated a unique version of the substantial evidence test that could be used to allow for the democratically mandated public interest reviews without requiring *de novo* review of consent decrees. Moreover, his final paper for Professor Bobbitt's Constitutional Interpretation class exemplifies his command of legal theory and sensitivity to the intricacies of judicial decision-making. I was particularly struck by his ability to simplify thorny theoretical concepts regarding the legitimacy of constitutional law as well as uncover similarities in what initially seem divergent approaches to adjudication. His strong analysis and passion for the subject matter are excellent signals of his potential as a judicial clerk, but beyond this Luke possesses a singular intellectual creativity and rigor that I believe will allow him to make important contributions to our legal system in the future.

In addition to his work as a law student, Luke's experiences as a litigation consultant and published fiction writer make him particularly well-suited for a judicial clerkship. During his three years at Analysis Group he assisted experts in testifying in complex, civil litigation by drafting expert briefs, deposition questions, and constructing economic analyses. In my office hours, he discussed with me a number of antitrust cases he worked on, including In re Asacol, a nationwide antitrust class-action, as well as on behalf of the DOJ to block the Anthem-Cigna health merger. I often testify as an expert witness in antitrust litigation and know through my own work at Cornerstone Research that the skills Luke acquired at Analysis Group will prepare him to hit the ground running as a judicial clerk. Finally, his passion for fiction-writing has undoubtedly served him well as a law student and will surely do so as a clerk. I've had the delight of reading some of his short stories in a literary journal called the Cadaverine. I was not surprised to find he had other creative outlets besides the law. He's an interesting, friendly and creative person who I'm sure will liven up any workplace.

Luke is the sort of law student who reminds his professors how to be passionate about the law. It has been a great pleasure to teach Luke and I look forward to seeing him flourish in his future career. I hope this letter has helped you to understand what a uniquely talented and capable individual Luke is and I would be happy to discuss his application with you further. I give Luke my full and enthusiastic recommendation. I have no doubts he will be a fantastic judicial clerk.

Sincerely,

Justin McCrary

Justin McCrary - jrm54@columbia.edu

February 28, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I have been asked to write a letter of recommendation for Mr. Luke Ross. I am pleased and honored to do so.

Mr. Ross was my student in a Constitutional Interpretation class last fall. As I have written elsewhere, “it was a wonderful class, far exceeding my expectations for the Zoom experience and it had a number of ‘stars.’ There was never a quiet moment, I was often surprised by the insights of the students and it was a highly competitive environment.” Even in that class, Mr. Ross was exceptional. He is quiet and not particularly assertive and so I often “cold called” him with the most difficult questions. He was unfailingly on point with concise, razor sharp and impressive replies.

Now a student like that may not be the best thing for a small class; Mr. Ross’ answers were so correct and so definitive that they tended to shut down further discussion, but such a student will make an absolutely fabulous clerk and I recommend him highly to you.

Please do not hesitate to contact me directly if you would like me to elaborate on any of these points or answer any questions you may have.

With every good wish,

Philip Bobbitt
Herbert Wechsler Professor of Jurisprudence
Columbia University

Philip Bobbitt - bobbitt@law.columbia.edu - 212-854-4090

Note: I drafted this legal memorandum as petitioner's counsel in a federal habeas simulation organized by my seminar instructors.

Memorandum re: David Johnson's Ineffective Assistance of Counsel Challenges

This memo considers the merits of three ineffective assistance of counsel (IAC) claims in David Johnson's federal habeas petition. It assumes Johnson will succeed on his "gateway claim" of actual innocence and thus overcome procedural obstacles to district court review on the merits of his constitutional claims.[1] The memo will introduce potential arguments, review controlling precedent, and discuss the relative strength of each claim given the facts of Johnson's case.

Background on Johnson's IAC Challenges

Johnson has sought federal post-conviction relief on the ground he lacked adequate trial counsel in violation of the Fifth, Sixth, and Fourteenth Amendments. On direct appeal to the Alabama Court of Criminal Appeals, he linked the inadequacy of his counsel to Alabama's scheme for compensating attorneys appointed to represent the indigent, as set out in § 15-12-21, Code of Alabama 1975. He argued that the state's $1,000 cap on attorney's fees in a capital case violated the Takings Clause of the Fifth Amendment, as applied to Alabama via the Fourteenth Amendment. Based on the opinions of the Court of Criminal Appeals, it is unclear whether Johnson properly raised a Sixth Amendment IAC challenge on either direct appeal or upon seeking state post-conviction relief.[2] However, this discussion proceeds under the assumption that the district court will reach the merits of all of his IAC claims.

[1] Schlup v. Delo, 513 U.S. 298, 315 (1995).
[2] If not, then Johnson would have to overcome the additional hurdle of showing his IAC claim is "substantial" and that state habeas counsel was "also ineffective in failing to raise the claim in his state habeas proceeding." Martinez v. Ryan, 566 U.S. 1 (2012); *see also* Trevino v. Thaler, 569 U.S. 413 (2013).

Summary of Potential Challenges

Johnson can raise two IAC claims with plausible chances of success. First, he can argue trial counsel failed to adequately investigate the facts of Ms. Gonzales' murder, the nature of the Birmingham Police Department's investigation, and his own abusive childhood. In doing so, he can appeal to his trial counsel's admission that Alabama's statutory fees for indigent counsel "left [him] unable to furnish real representation . . ."[3] Alternatively, he can argue his trial counsel failed to expend resources on expert testimony and other evidence gathering activities out of financial concerns, and, thus, provided constitutionally deficient counsel under *Hinton v. Alabama*. It is unlikely Johnson can succeed on an IAC claim centered solely on Alabama's underfunding of indigent defense counsel. Two district courts in the 11th Circuit have rejected such a challenge and the Supreme Court has never entertained an IAC claim grounded on systemic ineffectiveness due to inadequate resources.

Discussion

I. Strickland Framework and Modern Doctrine

In reviewing Johnson's IAC claims, the District Court for the Middle District of Alabama is bound to apply Supreme Court and Eleventh Circuit precedent. Under AEDPA, it will ask whether the Alabama state courts' rejection of Johnson's IAC claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[4] Under this deferential standard, the district court may disagree with yet uphold the state courts' rejection of Johnson's claims as "reasonable."[5] This

[3] Petitioner's Objections to the Report and Recommendations of the Magistrate Judge at 19, Johnson v. Ward, No. 2:07cv901-T (M.D. Ala. Jun. 28, 2010) [hereinafter "Petitioner's Objections"].
[4] Williams v. Taylor, 529 U.S. 362, 376 (2000).
[5] Woods v. Donald, 575 U.S. 312, 317 (2015).

remains the case even when the state court has failed to offer any explanation for its denial of an IAC claim.[6]

In *Strickland, v. Washington*, the Supreme Court set out a two-part test for adjudicating IAC claims. A defendant must show (1) that counsel's performance fell below an "objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[7]

The Court has held the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[8] In analyzing attorney performance, it has emphasized that any judicial evaluation must be "deferential" and take into account counsel's perception of the totality of circumstances.[9] As such, the district court is unlikely to second-guess trial counsel's strategic decisions. However, the Court in *Strickland* noted that death penalty counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[10] Over the last decade, nearly every successful IAC challenge at the Supreme Court has centered on counsel's flawed pre-trial or pre-sentencing investigation. With that said, however, the Court has acknowledged the existence of cases in which counsel may be deemed ineffective for failing to pursue the "only reasonable and available defense strategy."[11]

Recent examples of constitutionally deficient performance include:

- Failing to investigate a defendant's family history, mental health background, and the facts serving as the basis for the state's case in aggravation; conducting a cursory investigation into the accuracy and usefulness of a mitigation witness's testimony;

[6] Harrington v. Richter, 562 U.S. 86, 98 (2011).
[7] Strickland v. Washington, 466 U.S. 668, 687 (1984)
[8] *Id.* at 688.
[9] Wiggins v. Smith, 539 U.S. 510, 522 (2003).
[10] *Strickland*, 466 U.S. at 688-89.
[11] *Harrington*, 562 U.S. at 106.

introducing aggravating evidence while eliciting mitigation testimony due to inadequate preparation.[12]

- Failing to contact or interview known individuals regarding defendant's abusive childhood; failing to contact counselors from a drug treatment program that defendant had attended; failure to give three of defendant's four penalty phase witnesses sufficient notice before calling them to testify in mitigation; failing to elicit more than "scattered" mitigating evidence from mitigation witnesses.[13]

- Failing to seek additional funds to hire an adequate expert when that failure was not based on "any strategic choice but on a mistaken belief that available funding was capped at $1,000."[14]

- Conducting a one-day long mitigation investigation, consisting only of interviews with witnesses suggested by the defendant's mother, and failing to uncover significant evidence of defendant's childhood abuse and mental impairment.[15]

- Meeting once with the defendant and failing to obtain any of his school, medical, or military service records or interview any family members prior to the penalty phase.[16]

- Failing to review defendant's prior conviction file, despite knowing prosecution planned to use prior conviction as evidence in aggravation.[17]

It is important to note that the Eleventh Circuit and the District Court for the Middle District of Alabama grant significant leeway to counsel. The circuit often references the "doubly deferential" nature of habeas review of IAC claims.[18] Recently, it held that petitioner must prove that no fair-minded jurist could find that "competent counsel would have taken [or failed to take] the action that counsel did [or did not] take."[19] Furthermore, in a recent paradigmatic case, the District Court for the Middle District of Alabama applied § 2254(e)(1)'s "presumption of correctness" to counsel's failure to present any alibi witnesses then held plaintiff had failed to

[12] Andrus v. Texas, 140 S. Ct. 1875, 1879 (2020).
[13] Maples v. Comm'r, Ala. Dep't of Corr., 729 Fed. Appx. 817, 824 (11th Cir. 2018).
[14] Hinton v. Alabama, 571 U.S. 263, 274 (2014).
[15] Sears v. Upton, 561 U.S. 945 (2010).
[16] Porter v. McCollum, 558 U.S. 30, 39 (2009).
[17] Rompilla v. Beard, 545 U.S. 374, 389 (2005).
[18] *See* Mills v. Comm'r, Ala. Dep't of Corr., No. 21-11534, 2021 WL 5107477, at *8 (11th Cir. Aug. 12, 2021); Wood v. Sec'y, Dep't of Corr., 793 Fed. Appx. 813, 817 (11th Cir. 2019); Downs v. Fla. Dep't of Corr., 738 F.3d 240, 257-58 (11th Cir. 2013).
[19] Thomas v. AG of Fla., 992 F.3d 1162, 1186-87 (11th Cir. 2021).

rebut that presumption by "clear and convincing evidence."[20] To support its application of the (e)(1) standard, the court cited to case in which the Supreme Court explicitly refused to determine whether IAC claims should be reviewed under it.[21]

Assuming Johnson's counsel was constitutionally inadequate, the district court will turn to the question of prejudice. The Supreme Court has held that establishing prejudice under *Strickland* requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[22] Thus, the district court must ask whether there is a reasonable probability that, absent the errors of Johnson's counsel, "the factfinder would have had a reasonable doubt respecting [Johnson's] guilt [or suitability for death]."[23] However, the Court has interpreted AEDPA to limit prejudice to those instances in which every fair-minded jurist would agree a different outcome would have occurred given adequate counsel.[24] As such, in order to grant relief, the district court must find that no fair-minded jurist could reasonably believe Johnson would have been convicted and/or sentenced to death had he received constitutionally adequate counsel.

II. Johnson's Potential IAC Challenges

A. Trial Counsel Failed to Adequately Investigate

Johnson can argue his trial counsel failed to adequately investigate facts pertaining to the crime, the nature of the state's investigation, and Johnson's background and other mitigating factors. Based on my review of the record, Johnson's Objections to the Report and

[20] Boone v. Price, No. 2:15-cv-556-ECM, 2021 WL 4206618, at *10 (M.D. Ala. Sep. 15, 2021).
[21] *Id.* (citing Wood v. Allen, 558 U.S. 290, 301 (2010)).
[22] Hinton v. Alabama, 571 U.S. 263, 275 (2014).
[23] *Id.*
[24] Cullen v. Pinholster, 563 U.S. 170, 229 (2011).

Recommendation of the Magistrate Judge, and the Alabama Court of Criminal Appeals' opinion denying Johnson's direct appeal, I believe this is a plausible, yet difficult, path to relief.

Upon taking Johnson's case, trial counsel faced the following factual landscape. His client had confessed to committing a murder during a burglary in the company of three named accomplices. Johnson then pled not guilty and claimed his confession was untrue and coerced via illegal methods of questioning. Without that confession, the state lacked any objective evidence linking Johnson to the crime. In fact, the forensic evidence then available undermined the reliability of his confession.

The question is what a reasonable investigation would have looked like under these facts. Outside of basic steps, such as interviewing Johnson and his family members or seeking copies of forensic reports, controlling precedent as well as then-published ABA Guidelines suggest competent counsel should have done the following, at a minimum.

- Sought out persons mentioned in Johnson's statements to police for pre-trial and pre-sentencing interviews, including alleged accomplices, acquaintances, and the associate of Chris Calron who saw Richard Halstedder shortly before the murder.
- Sought out Ms. Gonzales' family members for pre-trial and pre-sentencing interviews, especially in light of the lack of forced entry and Johnson's statement that Chris Calron first identified the victim's house as a drinking location.
- Attempted to identify and interview persons with direct knowledge of the Birmingham Police Department's investigative practices.
- Considered securing an expert witness to review Johnson's confession and testify to its unreliability.

Because trial counsel took none of these steps, Johnson has a live claim that his investigation was constitutionally deficient. Moreover, trial counsel's admission to a "real personal conflict . . . affect[ing] [his] ability to deliver good lawyering and affect[ing] [Johnson's] rights to adequate counsel and a fair trial" speaks to the serious flaws in his pre-trial

and pre-sentencing investigations.[25] With that said, however, succeeding on an inadequate investigation claim is no easy task given the Supreme Court's and Eleventh Circuit's commitment to highly deferential review of attorney performance.

Johnson also has the burden of showing prejudice. That will require appealing to, at a minimum, the affidavits of the Gonzales family, Chris Calron's plea and allocution, and new expert analysis of Johnson's confession. Taken together, these may show an adequate investigation by Johnson's counsel would have unearthed facts connecting Richard Halstedder to the crime and uncovered the Birmingham Police Department's use of coercive interrogation techniques. Moreover, Johnson should argue that competent counsel would have contacted additional experts and sought independent forensic analysis to call into serious doubt the state's account of the murder.

In sum, there is enough to suggest competent counsel would have acquired powerful defense evidence following a reasonably thorough investigation. The information related to Richard Halstedder, coupled with the lack of forensic evidence, may itself have raised doubt in every juror's mind. As such, it is worth pursuing the failure to investigate claim, even if it is no guarantee of relief.

B. Failure to Seek Adequate Funding for Expert Witnesses and Evidence Gathering

Johnson can argue his trial counsel rendered inadequate assistance by failing to retain expert witnesses or fund other evidence gathering activities due to an unfounded concern over financial resources. In *Hinton v. Alabama*, the Supreme Court found an attorney's failure to seek additional funds to hire a proficient expert witness was constitutionally deficient in light of a statutory provision for state reimbursement "of any expenses reasonably incurred in such defense

[25] Petitioner's Objections at 5.

to be approved in advance by the trial court."[26] Johnson can thus contend that his trial counsel's concern over his own paltry attorney's fees resulted in an unnecessary failure to fund an adequate defense.

The similarities between the Hinton and Johnson cases are striking. Both involve murder convictions resting on a single type of evidence — the ballistics evidence in Hinton's case and the confession in Johnson's. As such, a successful trial defense required "effectively rebutting" that evidence.[27] In addition, Johnson's and Hinton's counsel voiced concerns with Alabama's funding statute and barely attempted to rebut the state's key evidence at trial. Moreover, Johnson, like Hinton, needed a competent expert witness to have any chance of convincing the trial court or jury of his innocence.

In *Hinton*, however, trial counsel admitted that his mistaken understanding of statutory requirements led him to retain and stick with an extremely ineffective expert witness.[28] It is not clear that Johnson's trial counsel worked under a similar misapprehension. Even so, that should not stand in the way of appealing to *Hinton*. For one, though the Court emphasized Hinton's counsel's "ignorance on a point of law,"[29] it is hard to see why his performance would be less deficient had he refused to seek additional funding due to anxieties over the speed of reimbursement or increasing his up-front costs. As such, Johnson may have a viable claim for deficient performance if he can show his trial counsel failed to expend resources on important elements of the defense due to his publicly-acknowledged financial concerns.

To show prejudice, Johnson must establish a "reasonable probability that [his] attorney would have hired an expert who [or engaged in other factfinding that] would have instilled in the

[26] Hinton v. Alabama, 571 U.S. 263, 274 (2014).
[27] *Id.* at 273.
[28] *Id.* at 268.
[29] *Id.* at 274.

jury a reasonable doubt as to Johnson's guilt [or suitability for death]" had his attorney not been preoccupied by financial concerns.[30] Without additional facts, it is hard to say whether Johnson can meet that burden. If so, however, his challenge has merit and will be an important test of *Hinton's* scope.

C. Structural Deprivation of Effective Counsel Due to Inadequate Funding of Indigent Counsel

Johnson may argue that Alabama functionally deprived him of effective counsel via persistent underfunding of indigent counsel. The Supreme Court has acknowledged that "appointed counsel in death penalty cases [in Alabama] are . . undercompensated."[31] However, neither the Supreme Court nor the Eleventh Circuit has held that underfunding of indigent counsel is unconstitutional *per se* under the Sixth Amendment or creates a rebuttable presumption of ineffective assistance. Two of the Alabama district courts have rejected that argument on the ground that Alabama's "woefully inadequate" funding of counsel in death penalty cases "is insufficient as a matter of law to overcome the presumption of effectiveness which attends the performance of counsel."[32]

Nonetheless, Johnson could retest the argument, appealing to the suggestion in *United States v. Cronic* that "a presumption of prejudice is appropriate" when circumstances render "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" sufficiently small.[33] Johnson could distinguish his case from those previously rejected by the district courts by emphasizing his trial counsel's questioning of his own competence in the face of financial constraints. With that said, however, federal courts have so far been unwilling to

[30] *Id.* at 276.
[31] Maples v. Thomas, 564 U.S. 266, 273 (2012).
[32] Hallford v. Culliver, 379 F.Supp. 2d 1232, 1279 (M.D. Ala. 2004); *See also* Maples v. Dunn, 2015 U.S. Dist. LEXIS 121905, at *139-40 (N.D. Ala. Sep. 14, 2015) ("[Inadequate funding] does not amount to ineffective assistance of counsel unless the lack of adequate funding *caused* actual errors or shortcomings in the performance of counsel that resulted in prejudice.").
[33] 446 U.S. 648, 659.

extend *Cronic* beyond its facts.[34] As such, Johnson is very unlikely to prevail unless he can show trial counsel "entirely fail[ed] to subject the case to proper adversarial testing."[35]

[34] *See, e.g.* Bell v. Cone, 535 U.S. 685, 696-97 (2002); Lewis v. Zatecky, 993 F.3d 994, 997 (7th Cir. 2021) (Reserving *Cronic* for the "extraordinary case" where defendant "receive[s] literally no assistance from his lawyer.").
[35] *Bell*, 535 U.S. at 696.

Applicant Details

First Name	**Marcela**
Last Name	**Schaefer**
Citizenship Status	**U. S. Citizen**
Email Address	**mes566@nyu.edu**
Address	**Address** Street **75 West St., Apt. 3B** City **New York** State/Territory **New York** Zip **10006** Country **United States**
Contact Phone Number	**(917) 704-8310**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**December 2011**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 23, 2019**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Raz, Keren
kgraz18@gmail.com
Endo, Seth
endo@law.ufl.edu
Kennedy, David
David.Kennedy2@usdoj.gov
212-637-2733

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Marcela E. Schaefer
75 West St., Apt. 3B
New York, NY 10006

March 4, 2022

The Honorable Lewis J. Liman
U.S. District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007

Dear Judge Liman:

I am a litigation associate at Sidley Austin LLP and a 2019 graduate of New York University School of Law, where I served as a Managing Editor of the New York University Law Review. I am writing to apply for the 2024–25 term clerkship in your chambers.

Enclosed please find my resume, law school transcript, undergraduate transcript, writing sample, and three letters of recommendation. My writing sample is a sentencing submission I wrote on behalf of a pro bono client. I argue that a sentence of time served is appropriate in my client's case because, among other factors, my client cooperated with the government and provided considerable assistance in the investigation and prosecution of fourteen members of a drug trafficking organization.

The following individuals wrote letters of recommendation on my behalf: Seth Endo, David Kennedy, and Keren Raz. Seth Endo is an Assistant Professor at the University of Florida Levin College of Law. He was my Lawyering professor and co-taught a seminar with Dean Trevor Morrison that I took, "Lawyers as Leaders: The Corporate General Counsel Seminar." He can be reached at endo@law.ufl.edu, or via phone at (352) 273-0701. David Kennedy is the Chief of the Civil Rights Unit at SDNY. He was my supervisor during my externship at SDNY, and also taught the seminar portion of the externship. He can be reached at David.Kennedy2@usdoj.gov, or via phone at (212) 637-2733. Keren Raz is a Senior Responsible Investment Specialist at APG Asset Management. Keren Raz was my supervisor during my internship at Morgan Stanley in the Environmental and Social Risk Management Group. She can be reached at kgraz18@gmail.com or via phone at (520) 247-3201.

Should you require any additional information, please contact me at mes566@nyu.edu or by phone at (917) 704-8310. Thank you for your consideration of my application.

Respectfully,
/s/ Marcela E. Schaefer

MARCELA SCHAEFER
75 West St., Apt. 3B
New York, NY 10006
(917) 704-8310
mes566@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., May 2019
Honors: *Law Review*, Managing Editor
Legal Publications: *Should a Parent Company Be Liable for the Misdeeds of Its Subsidiary: Agency Theories Under the Foreign Corrupt Practices Act*, 94 N.Y.U. L. REV. 1654 (2019)
Activities: Alternative Breaks, Co-Chair
Latinx Law Students Association, Member

SOAS UNIVERSITY OF LONDON, London, UK
M.Sc. in Middle East Politics, December 2013

FLORIDA STATE UNIVERSITY, Tallahassee, FL
B.S. in International Affairs with minors in Arabic and music, *cum laude*, December 2011
Honors: Dean's List, 5 semesters
Florida Bright Futures Scholarship (full tuition, academic merit-based)

EXPERIENCE

SIDLEY AUSTIN LLP, Manhattan, NY
Associate, September 2019–Present; ***Summer Associate***, May–July 2018
Work in the Litigation practice group. Participate in all aspects of complex litigation matters, including the internal investigation of a company for fraud, a securities class action, and an international arbitration representing a South American state-owned company in a commercial dispute. Maintain an active pro bono practice, including drafting habeas petitions and submitting asylum applications.

MORGAN STANLEY; LEGAL & COMPLIANCE DIVISION, Manhattan, NY
Legal Intern, January–June 2019
Worked with the Environmental and Social Risk Management Group. Conducted research and due diligence related to environmental, social, and governance (ESG) issues for client memos, reports, bank policies, and transactions.

SECURITIES AND EXCHANGE COMMISSION; NEW YORK REGIONAL OFFICE, Manhattan, NY
Legal Intern in the Student Honors Program, January–April 2018
Worked with SEC attorneys in the Enforcement Division. Edited briefs, conducted document review and legal research, and assisted attorneys with preparing for litigation of enforcement actions.

U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, Manhattan, NY
Legal Intern, August–December 2017
Worked with Assistant U.S. Attorneys in the Civil Litigation Division. Drafted briefs, conducted legal research, and analyzed relevant case law.

COLORADO LEGAL SERVICES; MIGRANT FARM WORKER DIVISION, Grand Junction, CO
Rural Summer Legal Corps Fellow, June–August 2017
Educated farm workers about their legal rights. Conducted legal research for cases related to wage theft and workers' rights. Drafted letters to the Department of Labor for U and T visa certification of clients.

NYU LAW CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, New York, NY
Student Scholar, January–May 2017
Researched issues including national security, human rights, and immigration. Assisted with event planning and the implementation of Center initiatives.

IPEK UNIVERSITY, Ankara, Turkey
English, Spanish, and French Language Instructor, September 2014–July 2016
Taught beginning ESL, French, and Spanish classes to 90 first and second-year university students. Developed curricula, lesson plans, and syllabi.

MIDDLE EAST INSTITUTE, Washington, DC
Research Assistant to Dr. Daniel Serwer, January 2014–May 2014
Drafted a report on ethnic and religious minorities in the Middle East. Collected data on Syria's civil society using English and Arabic source materials.

MADRE, Manhattan, NY
Program Intern, May 2012–August 2012
Provided research support related to MADRE campaigns and programs, including peace building, women's health, indigenous rights, and environmental justice. Wrote updates, proposals, and reports on MADRE programs. Translated documents to and from French, Spanish, and English.

ADDITIONAL INFORMATION
Fluent in English, Spanish, and French; elementary proficiency in Modern Standard Arabic.

Name: Marcela Elizabeth Schaefer
Print Date: 01/11/2022
Student ID: N11829518
Institution ID: 002785
Page: 1 of 2

NEW YORK UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
School of Law
FICE School Code: 002785

Send To: MARCELA ELIZABETH SCHAEFER

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/22/2019
School of Law
Major: Law

Fall 2016

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Seth Endo			
Torts	LAW-LW 11275	4.0	B
Instructor: Christopher Tarver Robertson			
Procedure	LAW-LW 11650	5.0	B
Instructor: Samuel Issacharoff			
Contracts	LAW-LW 11672	4.0	B
Instructor: Florencia Marotta			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: IP in HBO's "Silicon Valley"			
Instructor: Jeanne C Fromer			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2017

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Seth Endo			
Income Taxation	LAW-LW 10694	4.0	B
Instructor: Joshua David Blank			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Deborah C Malamud			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Stephen J Schulhofer			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2017

School of Law
Juris Doctor
Major: Law

International Law	LAW-LW 11218	3.0	B
Instructor: Mattias Kumm			
Government -Civil Litigation Externship- Southern District	LAW-LW 11701	3.0	CR
Instructor: Randy Hertz			
Property	LAW-LW 11783	4.0	B+
Instructor: Vicki L Been			
Government Civil Litigation Externship - Southern District Seminar	LAW-LW 11895	2.0	A-
Instructor: David Joseph Kennedy			
Regulation of Foreign Corrupt Practices	LAW-LW 12081	2.0	B+
Instructor: Scott William Muller			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2018

School of Law
Juris Doctor
Major: Law

Issues in SEC Enforcement Seminar	LAW-LW 10386	2.0	B+
Instructor: Walter Ricciardi			
Business Crime	LAW-LW 11144	4.0	B+
Instructor: Jennifer Hall Arlen			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: Oscar G Chase			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Jessica Bulman-Pozen			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	56.0	56.0

Fall 2018

School of Law
Juris Doctor
Major: Law

Criminal Procedure Survey	LAW-LW 10436	4.0	B-
Instructor: S Andrew Schaffer			
Directed Research Option A	LAW-LW 10737	2.0	A-
Instructor: Jennifer Hall Arlen			
Law Review	LAW-LW 11187	2.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	B
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	68.0	68.0

Spring 2019

School of Law
Juris Doctor
Major: Law

International Litigation and Arbitration	LAW-LW 10272	4.0	B+
Instructor: Linda J Silberman			
Instructor: Kevin D Benish			

RAISED SEAL NOT REQUIRED
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Elizabeth Kienle-Granzo
University Registrar
www.nyu.edu/registrar

ACADEMIC TRANSCRIPT

THE UNIVERSITY'S NAME APPEARS IN WHITE PRINT ACROSS THE FACE OF THIS RECORD

Name: **Marcela Elizabeth Schaefer**
Print Date: **01/11/2022**
Student ID: **N11829518**
Institution ID: **002785**
Page: **2 of 2**

NEW YORK UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
School of Law
FICE School Code: 002785

~~Lawrence~~ Collins

Evidence	LAW-LW 11607	4.0	B
Instructor: Stephen Gillers			
International Humanitarian Law	LAW-LW 12259	4.0	B+
Instructor: Ryan Goodman			
Lawyers as Leaders: The Corporate General Counsel Seminar	LAW-LW 12438	1.0	CR
Instructor: Seth Endo Trevor W Morrison			
Writing About the Law Seminar	LAW-LW 12609	2.0	B+
Instructor: Ryan Goodman Jesse Howe Wegman			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	83.0	83.0

Staff Editor - Law Review 2017-2018
Managing Editor - Law Review 2018-2019

End of School of Law Record

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ACADEMIC TRANSCRIPT

RAISED SEAL NOT REQUIRED
This official university transcript is printed on secured paper and does not require a raised seal. An official signature is white and is imposed upon the institutional seal.

Elizabeth Kienle-Granzo
University Registrar
www.nyu.edu/registrar

Florida State University
Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Marcela E Schaefer**
Student ID: 100384485

Birthdate: 08/25/1990
Gender: Female
Residency: Florida Resident (USA)
Print Date: 10/19/2014

Unofficial Transcript

ALL CREDIT HOURS ON THIS RECORD REFLECTED IN SEMESTER HOURS
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Transfer Credits

Transfer Credit from Florida State University
Applied Toward Undergraduate Studies Program

2008

Trm	Course	Description	Grd	CT	Input	Eval
FALL	FRE2992	FRENCH LANGUAGE (78)	EC		4.000	4.000
FALL	FRE1121	FRENCH LANGUAGE (78)	EC		4.000	4.000
FALL	FRE1120	FRENCH LANGUAGE (78)	EC		4.000	4.000
FALL	SPN2992	SPANISH LANGUAGE(79)	EC		4.000	4.000
FALL	SPN1121	SPANISH LANGUAGE(79)	EC		4.000	4.000
FALL	SPN2240	CEEB AP SPN/LANG (5)	EC		3.000	3.000
FALL	SPN2220	CEEB AP SPN/LANG (5)	EC		4.000	4.000
FALL	SPN1120	SPANISH LANGUAGE(79)	EC		4.000	4.000
		Term Totals			31.000	31.000

Transfer Credit from Hillsborough Cmty College
Applied Toward Undergraduate Studies Program

2006

Trm	Course	Description	Grd	CT	Input	Eval
FALL	AMH1010	EARLY AM HIST	A		3.000	3.000
FALL	CHM1025	MODERN CHEM	C		3.000	3.000
FALL	CHM1025L	MODERN CHEM LAB	A		1.000	1.000
		Term Totals			7.000	7.000

2007

Trm	Course	Description	Grd	CT	Input	Eval
FALL	ENC1102	FRESH ENGLISH II	A		3.000	3.000
FALL	MAC1105	COLLEGE ALGEBRA	A		3.000	3.000
SPR	ENC1101	FRESH ENG I	A		3.000	3.000
SPR	MAT1033	INTERN ALGEBRA	A		3.000	3.000
		Term Totals			12.000	12.000

2008

Trm	Course	Description	Grd	CT	Input	Eval
SPR	ANT2000	INTRO TO ANTHROPOLOG	A		3.000	3.000
SPR	ECO2023	PRIN OF MICROECONOMI	B		3.000	3.000
SPR	POS2041	AMERICAN GOVT	A		3.000	3.000
		Term Totals			9.000	9.000

Beginning of Undergraduate Record

2008 Fall

Program: Undergraduate Studies
Plan: Pre-International Affairs Major

Course	Description	Grd	CT	Taken	Passed	Points
ANT2511	INT PHY ANTHRO/PREHS	A-		3.000	3.000	11.250
HUM2210	HUM:PREHIST-ANTIQ	A		3.000	3.000	12.000
HUM2944	UNIV HONORS COLLOQ	S		1.000	1.000	0.000
MUS1010	STUDENT RECITAL	S		0.000	0.000	0.000
MUT1111	MUSIC THEORY I	B		3.000	3.000	9.000
MUT1241	S SING/E TRAIN I	A		1.000	1.000	4.000
MVK1211	APP MUS SEC PIANO	A-		2.000	2.000	7.500
MVS1211	APP MUS SEC VLN	A		2.000	2.000	8.000

DEAN'S LIST

			Taken	Passed	GPA Hrs	Points
Term GPA	3.696	Term Totals	15.000	15.000	14.000	51.750
Transfer Term GPA	3.679	Transfer Totals	28.000	28.000	28.000	103.000
Combined Term GPA	3.685	Comb Totals	43.000	43.000	42.000	154.750
Cum GPA	3.696	Cum Totals	15.000	15.000	14.000	51.750
Transfer Cum GPA	3.679	Transfer Totals	28.000	28.000	28.000	103.000
Combined Cum GPA	3.685	Comb Totals	43.000	43.000	42.000	154.750

2009 Spring

Program: Undergraduate Studies
Plan: Pre-International Affairs Major

Course	Description	Grd	CT	Taken	Passed	Points
GET3130	GERMAN LIT IN TRANS	A		3.000	3.000	12.000
MUN2451	DUO PIANO	A		1.000	1.000	4.000
MUS1010	STUDENT RECITAL	S		0.000	0.000	0.000
MUT1112	MUSIC THEORY II	B+		3.000	3.000	9.750
MUT1242	S SING/E TRAINII	A		1.000	1.000	4.000
MVK1211	APP MUS SEC PIANO	A		2.000	2.000	8.000
MVS2221	APP MUS SEC VLN	A		2.000	2.000	8.000
STA1013	STATISTCS THRU EXAMP	A		3.000	3.000	12.000

DEAN'S LIST

			Taken	Passed	GPA Hrs	Points
Term GPA	3.850	Term Totals	15.000	15.000	15.000	57.750
Transfer Term GPA		Transfer Totals	31.000	31.000	0.000	0.000
Combined Term GPA	3.850	Comb Totals	46.000	46.000	15.000	57.750
Cum GPA	3.776	Cum Totals	30.000	30.000	29.000	109.500
Transfer Cum GPA	3.679	Transfer Totals	59.000	59.000	28.000	103.000
Combined Cum GPA	3.728	Comb Totals	89.000	89.000	57.000	212.500

2009 Fall

Program: Bachelor's Degree
Plan: International Affairs Major

Florida State University
Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Marcela E Schaefer**
Student ID: 100384485

Birthdate: 08/25/1990
Gender: Female
Residency: Florida Resident (USA)
Print Date: 10/19/2014

Unofficial Transcript

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Course	Description	Grd	CT	Taken	Passed	Points
ARA1120	ELEMENTARY ARABIC I	A		4.000	4.000	16.000
INR2002	INTERNATNL RELATIONS	B+		3.000	3.000	9.750
MUT2116	MUSIC THEORY III	B		3.000	3.000	9.000
MUT2246	S SING/E TRAIN III	A-		1.000	1.000	3.750
MVO3230	APP MUS SEC MOD CDT	A		1.000	1.000	4.000
MVO3230	APP MUS SEC MOD CDT	A		1.000	1.000	4.000
PHM2300	INTRO POLITICL PHILO	A-		3.000	3.000	11.250

DEAN'S LIST

			Taken	Passed	GPA Hrs	Points
Term GPA	3.609	Term Totals	16.000	16.000	16.000	57.750
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.609	Comb Totals	16.000	16.000	16.000	57.750
Cum GPA	3.717	Cum Totals	46.000	46.000	45.000	167.250
Transfer Cum GPA	3.679	Transfer Totals	59.000	59.000	28.000	103.000
Combined Cum GPA	3.702	Comb Totals	105.000	105.000	73.000	270.250

2010 Spring

Program: Bachelor's Degree
Plan: International Affairs Major

Course	Description	Grd	CT	Taken	Passed	Points
ARA1121	ELEMENTARY ARABIC II	A-		4.000	4.000	15.000
FRE4930	SPECIAL TOPICS FRANCE & ALGERIA	A-		3.000	3.000	11.250
INR3933	INR SPECIAL TOPICS INTL CONFLCT RESLUTN	A		3.000	3.000	12.000
MUL2110	SURVEY OF MUS LIT	B+		2.000	2.000	6.500
MVK3231	APP MUS SEC PIANO	A		2.000	2.000	8.000

DEAN'S LIST

			Taken	Passed	GPA Hrs	Points
Term GPA	3.768	Term Totals	14.000	14.000	14.000	52.750
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.768	Comb Totals	14.000	14.000	14.000	52.750
Cum GPA	3.729	Cum Totals	60.000	60.000	59.000	220.000
Transfer Cum GPA	3.679	Transfer Totals	59.000	59.000	28.000	103.000
Combined Cum GPA	3.713	Comb Totals	119.000	119.000	87.000	323.000

2010 Fall

Program: Bachelor's Degree
Plan: International Affairs Major

Course	Description	Grd	CT	Taken	Passed	Points
ANT4277	HUMAN CONFLICT	A		3.000	3.000	12.000
ARA2220	INTERMEDIATE ARABIC	B+		4.000	4.000	13.000
HUM3930	SPECIAL TOPICS POWR POLITICS MID. E	A		3.000	3.000	12.000
MUH2512	WRLD MUS CULTURES I	A		2.000	2.000	8.000
MUN2800	WORLD MUSIC ENS	A		1.000	1.000	4.000
REL3363	ISLAMIC TRADITIONS	A		3.000	3.000	12.000

DEAN'S LIST

			Taken	Passed	GPA Hrs	Points
Term GPA	3.813	Term Totals	16.000	16.000	16.000	61.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.813	Comb Totals	16.000	16.000	16.000	61.000
Cum GPA	3.747	Cum Totals	76.000	76.000	75.000	281.000
Transfer Cum GPA	3.679	Transfer Totals	59.000	59.000	28.000	103.000
Combined Cum GPA	3.728	Comb Totals	135.000	135.000	103.000	384.000

2011 Spring

Program: Bachelor's Degree
Plan: International Affairs Major

Course	Description	Grd	CT	Taken	Passed	Points
CPO4057	POLITICAL VIOLENCE	B		3.000	3.000	9.000
FOL3930	EXPERIMNTS MODN LANG INTERMED MID ARABIC	B+		3.000	3.000	9.750
FRE4930	SPECIAL TOPICS IMMIGRAT& NAT IDENT	A-		3.000	3.000	11.250
MUH3212	MUS HIST 1750-PSNT	B+		3.000	3.000	9.750
SPC2608	PUBLIC SPEAKING	A-		3.000	3.000	11.250

COMPLETED 40.00 HOURS OF SERVICE TO THE COMMUNITY

			Taken	Passed	GPA Hrs	Points
Term GPA	3.400	Term Totals	15.000	15.000	15.000	51.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.400	Comb Totals	15.000	15.000	15.000	51.000
Cum GPA	3.689	Cum Totals	91.000	91.000	90.000	332.000
Transfer Cum GPA	3.679	Transfer Totals	59.000	59.000	28.000	103.000
Combined Cum GPA	3.686	Comb Totals	150.000	150.000	118.000	435.000

2011 Fall

Program: Bachelor's Degree
Plan: International Affairs Major

Florida State University

Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Marcela E Schaefer**
Student ID: 100384485

Birthdate: 08/25/1990
Gender: Female
Residency: Florida Resident (USA)
Print Date: 10/19/2014

Unofficial Transcript

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End of Service Transcript

Course	Description	Grd	CT	Taken	Passed	Points
ARA4421	MEDIA ARABIC	A		3.000	3.000	12.000
CGS2060	COMPUTER FLUENCY	B		3.000	3.000	9.000
CPO3403	COMPAR GOVT MID EAST	A-		3.000	3.000	11.250
FRW4761	STUD FRAN LIT CULT	A		3.000	3.000	12.000
MUN2800	WORLD MUSIC ENS	A		1.000	1.000	4.000

DEAN'S LIST.

			Taken	Passed	GPA Hrs	Points
Term GPA	3.712	Term Totals	13.000	13.000	13.000	48.250
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.712	Comb Totals	13.000	13.000	13.000	48.250
Cum GPA	3.692	Cum Totals	104.000	104.000	103.000	380.250
Transfer Cum GPA	3.679	Transfer Totals	59.000	59.000	28.000	103.000
Combined Cum GPA	3.689	Comb Totals	163.000	163.000	131.000	483.250

Degrees Awarded

Degree: Bachelor of Science
Program: International Relations & Affairs
Confer Date: 12/17/2011
Degree Honors: Cum Laude
Plan: International Affairs

Undergraduate Career Totals

			Taken	Passed	GPA Hrs	Points
Cum GPA:	3.692	Cum Totals	104.000	104.000	103.000	380.250
Trans Cum GPA	3.679	Trans Totals	59.000	59.000	28.000	103.000
Comb Cum GPA	3.689	Comb Totals	163.000	163.000	131.000	483.250

End of Undergraduate

End of Academic Transcript

Beginning of Service Transcript

Community Service Hours For 2011 Spring			
Issue	**Agency**	**Service Task**	**Hours**
Education Adult Ed	FSU Ctr Intensive English CIES	Conversation Partner	20
		Service Hours for 2011 Spring	**20**
		Cumulative Service Hours	**20**

225 Sterling Place
Brooklyn, NY 11238
kgraz18@gmail.com
520-247-3201

Your Honor:

It is my pleasure to submit this letter of recommendation for Marcela Schaefer. As background, I am the Senior Responsible Investment Specialist for APG Asset Management, one of the largest asset managers in the Netherlands. Prior to this role, I served as Head of Environmental and Social Risk Management for Morgan Stanley. It was in this role that I came to know Marcela. She joined my team as a legal intern for the 2018-2019 school year. Having worked closely with Marcela for the entire school year, I can attest to her intellect and analytical smarts. I have no doubt that she will impress you as much as me.

To describe her strengths in more detail, Marcela is a quick learner. When she started her internship, she was unfamiliar (as many are) with what it meant to address environmental and social risk within a financial institution. It is still an emerging area of finance. Though Marcela had not studied environmental law nor human rights law, it did not matter. She took the initiative to research and educate herself about new concepts. Her assignments included research into shareholder resolutions on human rights and fossil fuel financings, a detailed memo reviewing an NGO's assessment of bank financings linked to deforestation, and a comparative analysis of bank policies on fossil fuels.

That last assignment also highlighted Marcela's analytical strengths. The analysis was not straightforward as each policy was nuanced in its differences. Marcela dissected the differences and helped us design a benchmarking tool that the team still uses today.

Marcela is one of the hardest workers I know. She worked 20 hours a week at Morgan Stanley, served as Managing Editor of the NYU Law Review, wrote a Note for publication, and carried a full courseload, all in her last year of law school. She was organized and communicative about deadlines. Her shoes were difficult to fill after she concluded her internship. Everyone on our team missed her when she was gone. You will not regret selecting her as a clerk.

Warm regards,

Keren G. Raz

UF UNIVERSITY of FLORIDA

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May 29, 2020

RE: Marcela Schaefer, NYU Law '19

Your Honor:

I am writing in enthusiastic support of Marcela Schaefer's application for a clerkship in your chambers. Marcela was a student in both my first-year Lawyering course and the upper-level Lawyers as Leaders: The Corporate General Counsel Seminar. Lawyering is a full-year experiential-learning class on the fundamentals of legal practice that is required for all first-year students at NYU School of Law. Lawyers as a Leaders is a small seminar in which the students engage in weekly case studies with visiting general counsel from companies ranging from Blackrock to Estee Lauder. In both of these classes, Marcela demonstrated great thoughtfulness and commitment to the overarching exercise of figuring out what it means to be an excellent and ethical lawyer. Given Marcela's strengths and based on my experience clerking for several judges, I am confident that Marcela would make a valuable member of your team.

In both Lawyers as Leaders and Lawyering, Marcela demonstrated a keen, analytic mind. Her written assignments were consistently well-organized and reflected a considered synthesis of the underlying legal concepts. And Marcela put in the time and effort to fully understand the concepts so that she could present her arguments in an accessible and cogent fashion. She also was deliberate and conscientious about integrating feedback and substantially improving what was already very good work product, continually growing more confident in her analysis. In pass-fail courses, this combination of thoughtfulness and ownership over her own professional development was extraordinary and speaks to her inner drive and integrity.

Additionally, Marcela consistently demonstrated strong interpersonal and communication skills. She participated enthusiastically in class, adding to the conversations in a way that showed an understanding of the readings and the impact of the legal issue in the wider world. Illustrating similar abilities, in Lawyering's simulation exercises involving clients, Marcela was able to translate the legal issues for the clients, simultaneously communicating both expertise and empathy.

Finally, I take my students out for group lunches so I can get to know them a bit more on a personal level. Marcela is unfailingly considerate and personable. And, from our discussions at lunch and in office hours, I learned about Marcela's pre-law school jobs and

law school activities. These experiences—including her teaching experience in Turkey, participation in the Law Women group. public interest work, and stewardship of the *NYU Law Review*—amply conveyed her dual commitment to pushing herself to grow and to making a difference in the world. Not surprisingly, Marcela's post-graduate work experience shows the same commitment to excellence and using her skills to make an impact. The breadth of her activities and employment also speaks to Marcela's wide-ranging interests and enthusiastic engagement with the world.

Given her work ethic, analytic ability, and overall thoughtfulness, I'm confident that Marcela is going to use her legal training to do great things and would contribute to your chambers. Please don't hesitate to contact me if you have any questions or I can otherwise be of more assistance. I am now teaching civil procedure and professional responsibility at the University of Florida but my NYU email (seth.endo@nyu.edu) should remain active and I can always be reached via my mobile telephone line, (231) 753-8255.

All my best,

Seth Katsuya Endo
Assistant Professor of Law

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, NY 10007

June 12, 2020

Re: *Recommendation of Marcela Schaefer*

Dear Judge:

I am writing to recommend Marcela Schaefer for a clerkship in your Chambers. Marcela interned with Assistant United States Attorneys in the Civil Division during the Fall 2017 semester as part of New York University Law School's Government Civil Litigation Clinic. I co-teach the class, which meets for two hours a week for classroom discussion, and keep apprised of the approximately twelve to fifteen hours of work per week done by the interns with their assigned AUSAs. Prior to becoming an Assistant United States Attorney in 2000, I clerked for the Hon. Kimba M. Wood of the Southern District of New York, and the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit. Based on my own years as a law clerk, my classroom experience with Marcela, and my discussion of her with the AUSAs for whom she worked, I believe that Marcela would perform well as a law clerk.

In person, Marcela is very bright, inquisitive, good humored, and enthusiastic, and was a delight to have in class. She participated ably in class discussions and simulations of oral arguments, depositions, settlement negotiations, and opening statements. I also had the opportunity to review Marcela's written work product, as students in the class write a reply brief for a summary judgment motion. In Marcela's case, she was assigned a fact-intensive Title VII case in which the plaintiff was making a flurry of allegations. Marcela's brief was clear and well-written, and required only minor line editing before it would be suitable for filing. I was also impressed by her extensively researched and thoughtful NYU Law Review article on the Foreign Corrupt Practices Act. In my estimation, Marcela has all of the necessary skills to excel as a law clerk.

In addition to the seminar, Marcela was assigned to work with two AUSAs. One aspect of the clinic that challenges law students is that AUSAs are typically working on numerous complex matters simultaneously. To keep on top of the work, an intern must be able to address questions as they arise under very different statutes, under tight deadlines, and keep two different supervisors happy. The AUSAs for whom Marcela worked recalled her as an enthusiastic, diligent, and communicative intern who produced reliable, robust, and convincing research and analysis. Marcela was interested in and committed to the work of the Office, and the AUSAs enjoyed having her as an intern.

Based on these experiences with Marcela, I recommend her as a law clerk. Please do not hesitate to contact me at the number below if you have any further questions.

Sincerely,

\s\ David J. Kennedy
David J. Kennedy
Assistant United States Attorney
Tel. No. (212) 637-2733
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AMERICA • ASIA PACIFIC • EUROPE

June 23, 2021

By ECF

The Honorable Colleen McMahon
United States District Court
Southern District of New York
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: ***United States v.*** [redacted]

Dear Judge McMahon:

We represent defendant [redacted], who is scheduled to be sentenced by Your Honor on July 7, 2021. We respectfully submit this letter for the Court's consideration in connection to Mr. [redacted]'s sentencing. As described more fully below, we submit that a sentence of time served is appropriate in this case because: (1) he is a cooperator whose assistance led to the arrest and prosecution of fourteen members of a dangerous drug organization in Washington Heights and subsequently offered important information about correctional officers illegally supplying contraband at the [redacted] Correctional Facility; (2) he cooperated immediately and extensively with law enforcement officials; (3) he has already been incarcerated for nearly 40 months—including throughout the entire pandemic when he was at significant risk and others were being released as a result; and (4) the sentences of non-cooperating defendants who played similar roles within the drug organization have generally averaged 38 months.

Because of these facts, we respectfully request that the Court impose a sentence of time served, pursuant to 18 U.S.C. §§ 3553(a) and (e). We respectfully submit that, for the reasons set forth below, anything more would be "greater than necessary" to achieve the purposes of sentencing. 18 U.S.C. § 3553(a).

APPLICABLE LAW

In imposing a sentence, the Court is required to consider the statutory sentencing factors as set forth in Title 18, United States Code, Section 3553(a). Specifically, those factors include the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense and to afford adequate

deterrence; the applicable Guidelines range; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

There is no presumption that a sentence within the applicable Sentencing Guidelines range is a reasonable or appropriate sentence. *Gall v. United States*, 552 U.S. 38, 50 (2007) (sentencing court "may not presume that the Guidelines range is reasonable"). Rather, the Supreme Court has instructed that, after determining the applicable Guidelines range, the sentencing court must "consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the [applicable guideline range] with reference to the latter." *Nelson v. United States*, 555 U.S. 350, 351 (2009). The "lodestar" of this analysis is "the parsimony clause of 18 U.S.C. § 3553(a), which directs sentencing courts to 'impose a sentence sufficient, but not greater than necessary to comply with' [those] factors." *United States v. Douglas*, 713 F.3d 694, 700 (2d Cir. 2013) (citation omitted). This clause mandates that a court consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in imposing a sentence. 18 U.S.C. § 3553(a)(1). Sentencing courts "may not presume that the Guidelines range is reasonable" and "extraordinary circumstances" are not required "to justify a sentence outside the Guidelines range." *Gall v. United States*, 552 U.S. 38, 47, 50 (2007); *see also Rita v. United States*, 551 U.S. 338, 351 (2007).

One obvious circumstance that justifies a substantial variance from the applicable Guidelines range is when the defendant has cooperated with the government and provided considerable assistance in the investigation and prosecution of others. Pursuant to 18 U.S.C. § 3553(e), upon motion by the government, a court may depart downward below the statutory minimum sentence "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e). Section 5K1.1 of the Sentencing Guidelines states that the Court's possible departure from the Guidelines due to a defendant's substantial assistance is based on a number of factors: (1) the Court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the Government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and (5) the timeliness of the defendant's assistance. U.S.S.G. § 5K1.1

DISCUSSION

I. MR. [redacted]'S HISTORY AND CHARACTERISTICS

[redacted] was born on July 30, 1976 in New York, New York to a working class family. (PSR ¶ 139.) His father, [redacted], ran a small business selling auto

parts, while his mother, [redacted], was a New York City school teacher. (PSR ¶ 140.) [redacted] was the youngest of three children and was raised with his two sisters, [redacted] and [redacted]. (PSR ¶ 140.) Growing up, [redacted]'s family was tight knit and lived in a small apartment in the Washington Heights neighborhood of Manhattan. While his parents worked during the day, Mr. [redacted]'s maternal grandmother, [redacted], provided childcare and helped raise him. (PSR ¶ 141.)

As described by [redacted]'s sister [redacted] and cousin [redacted], [redacted]'s family was and is very close. (PSR ¶ 142; Ltr. from [redacted] (Ex. A, hereto).) Despite [redacted]'s tumultuous life over the years, they have maintained stable, reliable, and supportive ties with him. Their hope for him, as is [redacted]'s, is to plan for the future and to rebuild his life. (PSR ¶ 142.)

[redacted] plainly has made mistakes in the past. Nevertheless, those who know [redacted] best willingly vouch for him, and they proudly acknowledge the love, kindness, and compassion he has shown them. His cousin [redacted] points out that she "and many of his friends . . . are convinced that [redacted] is a human being with a great heart and a decent person." (Ltr. from [redacted] (Ex. C, hereto).) As [redacted]'s cousin [redacted] notes, "[[redacted]] is a giving person and loves his family wholeheartedly. He has shown a great amount of empathy and good character when faced with personal family conflicts." (Ltr. from [redacted] (Ex. D, hereto).) [redacted]'s oldest sister points out that her brother is "a good brother and has never once disrespected me or my sister when we have had conversations that he may not like; he has always been present in our lives and is always there when we need him." (Ltr. from [redacted] (Ex. B, hereto).)

These friends and family members have seen the positive impact [redacted] has had on his loved ones and wholeheartedly support him. "He has a large and supportive system in his entire family and me. If he is incarcerated, we will be there for him when he is released. If [the Court] see[s] fit to suspend his sentence, we will do everything in our power to help [redacted] in his heartfelt . . . return to a positive lifestyle." (Ex. D.) Another of [redacted]'s cousins attests that "[[redacted]] has shown sincere remorse for his infractions or offenses. He has made several actions that showed his sincerity to make amends." (Letter from [redacted] (Ex. E, hereto).) [redacted] adds, "I believe [[redacted]] is ready to be a productive member of society and spent to second half of his life making up for his past mistakes and enjoying it next to his children and aging parents." (Letter from [redacted]. (Ex. F, hereto).) Consequently, [redacted]'s family members are confident that with their love and support as well as [redacted]'s own desire and determination to change, he can reintegrate into society. (Ex. A; Ex. B; Ex. D.; Ex. F.)

A. MR. [redacted]'S CHILDREN

In 1991, [redacted] met [redacted] when they were high school students in the Bronx. In 1992, their daughter, [redacted], was born. (PSR ¶ 144.) Unfortunately, before [redacted]'s birth, [redacted]'s father [redacted] sold his auto parts shop in Manhattan and moved the family to the Dominican Republic. (PSR ¶ 140.) Shortly after the [redacted] family moved to the Dominican Republic, [redacted] and [redacted]'s relationship ended. (PSR ¶ 144.) From 1991 to 1997, [redacted] lived in the Dominican Republic with his parents. (PSR ¶ 149.) [redacted] returned to New York in 1998 while his parents remained in the Dominican Republic where they continue to reside to this day. (PSR ¶ 140.)

In 2000, [redacted] met [redacted] in Washington Heights, and they had a brief relationship that produced a son, [redacted], age 19. (PSR ¶ 145.) Later in 2006, [redacted] had a relationship with [redacted] and they had a daughter, [redacted], age 13. Sometime after [redacted] and [redacted]'s relationship ended, [redacted] was deported to the Dominican Republic. (PSR ¶ 148.) Tragically, she unexpectedly passed away when [redacted] was still a small child. Upon [redacted]'s death, [redacted] took custody of his daughter and the two of them lived with his aunt in Manhattan. About a year and a half before he was arrested in December 2017, [redacted] and his parents decided together that it would be in [redacted]'s best interests for her grandparents to take temporary custody of her and for her to attend boarding school in the Dominican Republic. As a result, [redacted] currently lives with [redacted]'s parents in Santo Domingo. (PSR ¶ 148.)

As described by his family members, [redacted] "cares deeply for all his loved ones." (Ex. F.) His cousin pointed out that "even from prison he would stay in touch with us all and make sure that his parents, sisters, children, aunts, cousins and even great cousins were well." (Ex. A.) Although [redacted]'s years of incarceration have prevented him from playing an active role in his children's lives, he has nevertheless made an effort to maintain relationships and stay in touch with each of them. He stays in contact with all three of them regularly and talks to his oldest two children a minimum of three times a week—sometimes daily. In addition to being a father of three, [redacted] is now a first-time grandfather to [redacted]'s one-year-old son, whom he has never met. His children and now grandson are "all anxiously awaiting his return [to society] to get reacclimated." (Ex. F.)

Despite his inability to consistently help raise her thus far, [redacted] has an especially close relationship with his daughter [redacted]. '[redacted] is the type of dad that plays with dolls with his youngest daughter, dresses up in costumes to simply make her happy, and gives her manicures when her nails need to be done. [redacted] is a present dad when he is home." (Ex. B.) Currently, [redacted] strives to maintain his relationship with his youngest child by speaking to [redacted] on the phone on a daily basis. Upon his release, it is [redacted]'s intention for him to have full custody of

[redacted]. It is this crucial role as a parent and guardian that motivates [redacted] to leave his criminal history in the past and provide a loving and supportive home for his young daughter.

B. MR. [redacted]'S DRUG ADDICTION

Unfortunately, [redacted] has been addicted to drugs most of his adult life. He started smoking marijuana at approximately age 13. (PSR ¶ 153.) [redacted] subsequently started using cocaine on the weekends with friends starting at age 20. (PSR ¶ 153.) Finally, adding to his habits, [redacted] started snorting heroin in his late twenties, while he was incarcerated. By his mid-thirties, he was snorting heroin almost daily. (PSR ¶ 153.) Since 2008, [redacted] has attempted to obtain treatment for his drug addiction, but has failed to complete those programs. Most recently, [redacted] started a drug treatment program at [redacted] Correctional Facility in November 2017. (PSR ¶ 154.) He was unable to complete his program because he was writted to federal custody one month later. (PSR ¶ 155.)

C. MR. [redacted]'S CRIMINAL HISTORY

An examination of [redacted]'s criminal history reveals that he is not a hardened criminal—the offenses he committed beginning in his early adulthood were a result of and in order to finance his substance abuse addictions. His crimes are the actions of a foolish and desperate drug addict, not cold-hearted and calculated. For example, two criminal sales of a controlled substance in the 5th degree when [redacted] was 24 and 26 years old account for six of his criminal history points. (PSR ¶¶ 83, 87.) In 2013 [redacted] was charged with the criminal sale and possession of a controlled substances after he was stopped by the police and found with envelopes containing heroine. (PSR ¶¶ 103-04.) Another time, [redacted] was arrested and charged with criminal possession of a controlled substance after he was stopped by the police and found in possession of a small amount of heroin. (PSR ¶ 107-08.) More recently, [redacted] was caught shoplifting vitamin supplements and chap stick. (PSR ¶¶ 106, 110; Gov't 5K Ltr. at 4-5.) In short, although [redacted]'s criminal history is long, nearly all of his crimes were related to drugs or financing his drug habit. Moreover, [redacted]'s convictions and charges are all property-related and never involved weapons.

II. THE OFFENSE CONDUCT AND [redacted]'S COOPERATION WITH LAW ENFORCEMENT

[redacted] is well aware that his offense in this case is inexcusable, and that he alone is to blame for the sentence he is to receive. But the offense should nonetheless be viewed in the context of the charged conspiracy.

From July 2016 through December 2, 2017, [redacted] worked for a drug trafficking organization that sold heroin laced with fentanyl in the Washington Heights neighborhood of Manhattan. (PSR ¶ 10, 15). Between August 7, 2017 and August 8, 2017, [redacted] sold drugs to an undercover officer. (PSR ¶ 16). From July 2016 through December 2, 2017, [redacted]

distributed approximately one kilogram of heroin. (PSR ¶ 17.) It is important to note, however, that [redacted]'s role in the conspiracy was limited in scope and he is not charged with having engaged in any violence. Nor has the Government asserted that he was a supervisor or leader. (PSR ¶ 108.) Rather, [redacted] was initially a "Lookout" who monitored and warned other drug trafficking organization members of law enforcement activity in the area. (PSR ¶ 15.) He then became a "Pitcher;" a street-level dealer who engaged in hand-to-hand sales. (PSR ¶ 15.) While this in no way excuses [redacted]'s crimes, we respectfully submit that [redacted]'s low-level role in the conspiracy makes clear that he is one of the least culpable of the defendants who were charged in this case.

[redacted] is well aware that the decision to participate in a conspiracy to distribute heroin was his, and that he—and no one else—is responsible for his current predicament. [redacted] knew then that what he was doing was wrong. It was this acknowledgment of wrongdoing and acceptance of responsibility that led to [redacted]'s timely and extraordinary cooperation with the Government's investigation into this crime and others.

Shortly after his arrest, [redacted] made the critical decision to plead guilty and cooperate with law enforcement officials. He began proffering on October 5, 2018 and pleaded guilty to the Superseding Information, pursuant to a cooperation agreement with the Government. Since that day, he has never looked back. Instead, [redacted] has tried to atone for his mistakes by assisting the Government with respect to both his own crime, as well as contraband entering the [redacted] Correctional Facility of which he had knowledge. In so doing, [redacted] has not only made a break from his past, but he has also put his own life at risk. He turned his back on a false criminal "code of the streets" that rejects cooperation with law enforcement and mandates harm to those who assist in solving crime.

Due to [redacted]'s extraordinary cooperation, the Government has submitted a letter pursuant to the § 5K1.1 of the Sentencing Guidelines, dated June 21, 2021 ("Gov't 5K Ltr."). In our view, such a letter is well-deserved. [redacted] provided immediate, timely, complete, wide-ranging, reliable, and highly significant assistance to the Government. We respectfully submit that [redacted]'s substantial assistance is worthy of this Court's consideration as the basis for a sentence of time served.

As previously noted, Section 5K1.1 of the Sentencing Guidelines states that the Court's possible departure from the Guidelines due to a defendant's substantial assistance is based on a number of factors. In this case, [redacted] satisfies every one of these criteria.

First, [redacted]'s cooperation was unquestionably timely. On September 12, 2018, [redacted] was transferred from the custody of the New York State Department of Corrections and Community Supervision to federal custody. (PSR ¶ 51.) The federal government specifically transferred [redacted] from state prison because of his knowledge and involvement in the [redacted]

[redacted] Drug Trafficking Organization ("DTO"). [redacted] "began cooperating with the Government before he was charged with any federal crimes, and in fact before anyone was charged in this case." (Gov't 5K Ltr. at 6.) "Short of coming forward off the street to report a crime, there is no way for a witness's assistance to be more timely." (Gov't 5K Ltr. at 8.)

Once [redacted] began cooperating, he was forthcoming about his own role in the offenses and also about the role of other co-defendants. (Gov't 5K Ltr. at 7.) Ultimately [redacted] provided the Government with crucial information that might otherwise have taken months or years to come to light. In fact, "the Government heavily credits [redacted] with providing the assistance needed to charge the case in the first place." (Gov't 5K Ltr. at 6.) The defense submits that [redacted]'s cooperation ultimately directly contributed to the guilty pleas of [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted].

Second, [redacted]'s cooperation was complete, wide-ranging, reliable, significant, and highly useful. From November 5 through December 20, 2018, he attended five proffers, each one of which lasted several hours. During those proffers, [redacted] was extensively debriefed by officers and prosecutors. [redacted] reviewed hundreds of photographs to identify co-conspirators, reported how the DTO stamped the glasses of drugs it sold as a means of marketing its brand, and provided details about how the DTO controlled drug sales out of 105 West 167th Street building and the surrounding area of Washington Heights. (Gov't 5K Ltr. at 6-7.) Thus, [redacted] gave law enforcement a comprehensive understanding of the crimes in which he had been involved, and a top-to-bottom view of the conspiracy of which he had been a member. (Gov't 5K Ltr. at 6.) All of this was information that the Government could and did use to further its investigation and corroborate its existing knowledge. (Gov't 5K Ltr. at 7, 8.)

Third, [redacted]'s cooperation was extraordinary because it led to the arrest and conviction of nearly everyone involved in the offense.[1] When confronted with his wrongs, [redacted] did not shy away; instead, he worked to make things right, and his efforts yielded substantial results. Based in large part on [redacted]'s information, the Government was able to indict and arrest fourteen participants in the DTO, including its leaders, [redacted], [redacted], and [redacted], shutting the whole organization down. (Gov't 5K Ltr. at 7.) Almost all of the charged defendants have pled guilty, and only [redacted]'s sentencing remains pending. (PSR ¶ 7.)

Had [redacted]'s cooperation been limited to the substantial assistance noted above, it would have merited a strong 5K1.1 letter from the Government. But [redacted] did more, providing additional significant details regarding an unrelated investigation. While [redacted] was already in federal custody and cooperating against the DTO, the Government contacted him yet

[1] [redacted] remains a fugitive, the Government made an entry of *nolle prosequi* in [redacted]'s case, [redacted] died, and [redacted]'s case remains pending. (PSR ¶ 7.)

again to request his assistance in an unrelated investigation into the smuggling and distribution of contraband at the [redacted] Correctional Facility ([redacted]). Again, [redacted] cooperated without hesitation, proffering on two occasions, in June and September of 2020, and supplying valuable information. During those proffers, [redacted] described the contraband he witnessed his cellmate hiding, explained how it was being transported into the facility, and even identified some of the inmates and at least two corrections officers involved in smuggling and distributing marijuana, cellphones, and cigarettes. (Gov't 5K Ltr. at 7.) "In the Government's view, this cooperation over the course of over two and a half years has been extensive and significant in nature." (Gov't 5K Ltr. at 8.)

Fourth, [redacted]'s cooperation has been emotionally taxing to him. As the Government noted, [redacted] "engaged in [the last two] proffers at risk to his own personal safety as they occurred in the midst of the pandemic over video teleconferences. Specifically, due to the fact that very few inmates were allowed to participate in such video conferences, [redacted] potentially attracted unnecessary suspicion." (Gov't 5K Ltr. at 8.) [redacted] remains at risk for as long as he is incarcerated, especially if he receives a lengthy prison sentence. Simply put, [redacted] cannot be put into the general population of a Bureau of Prisons penitentiary—his extensive cooperation would put him in imminent risk of physical harm. Moreover, it is possible that "the Government will call upon [redacted] to testify if [redacted] or yet-uncharged subjects eventually proceed to trial." (Gov't 5K Ltr. at 8.)

III. THE APPLICABLE SENTENCING GUIDELINES RANGE AND THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES

The Government has asserted that the applicable offense level is 33 and that the applicable Guidelines range is 235 to 293 months, with a mandatory minimum of 120 months' imprisonment for Count 1. (PSR ¶ 169.) According to the Government, because [redacted] is responsible for distributing a total of 52,010 kilograms in Converted Drug Weight, pursuant to § 2D1.1(a)(5) and (c)(2) of the Sentencing Guidelines, the base level offense is 36. (PSR ¶ 66.) Because [redacted] accepted responsibility for the offense and timely notified the authorities of the intention to enter a guilty plea, a three-level reduction was warranted pursuant to USSG § 3E1.1(a) and USSG § 3E1.1(b). (PSR ¶¶ 74-75.)

The Federal Sentencing Guidelines provide an important framework to assist the courts in assessing the severity of an offense. However, because it is a quantitative approach, the Guidelines are heavily based on measurable quantities, such as drug weight in a narcotics case, without fully taking into consideration the particular context of a defendant's involvement. There are nuances within crimes that are not always properly captured in the Guidelines, as here, where [redacted]'s limited participation in a narrow activity of a broader criminal enterprise is not properly accounted for by the applicable Guidelines range of 235 to 293 months, which in this case, has the effect of being fiercely punitive.

The United States Probation Office agrees with this assessment. In formulating an appropriate recommended sentence, the Probation Office relied on [redacted]'s own admission that he personally sold one kilogram of heroin during the time he was active; approximately from July 2016 through December 2, 2017. (PSR ¶ 15.) Based on this drug amount rather than the total amount of 52,010 kilograms that the DTO sold collectively, [redacted]'s total offense level would have been 27. (PSR at p. 40.) Coupled with [redacted]'s criminal history category, his Guidelines range of imprisonment would have been 130 to 162 months. (PSR at p. 40). Making clear that it had "not factor[ed] in the defendant's cooperation" (PSR at p. 40) (emphasis added), the Probation Office recommended a sentence within that one-kilogram-based range (PSR at p. 41).

In addition to the factors noted above, *supra* Section II, under Section 3553(a), a sentencing court must consider the need to avoid unwarranted sentencing disparities among similarly situated defendants. In the Presentence Report, the Probation Office identified fourteen co-defendants. Nine have already been sentenced and to date all have received significant variances below their respective applicable Guideline ranges of imprisonment. (PSR ¶ 186.) For example, the Guidelines range for [redacted] was reportedly 135 to 168 months, *United States v.* [redacted], Dkt. No. [redacted], at 7 ([redacted] sentencing submission), and Mr. [redacted] was sentenced principally to a term of 24 months' imprisonment (PSR ¶ 7). [redacted]'s Guidelines range was reportedly 168 to 210 months, *United States v.* [redacted], Dkt. No. [redacted], at 2 ([redacted] sentencing submission), and she was sentenced principally to time served (one day) and four years' supervised release (PSR ¶ 7). [redacted]'s Guidelines range was reportedly 168 to 210 months, *United States v.* [redacted], Dkt. No. [redacted], at 2 ([redacted] sentencing submission), and he was sentenced principally to 54 months' imprisonment (PSR ¶ 7). Besides [redacted], who helped manage the DTO's drug supply and drug proceeds—and who also received a sentence significantly below his respective applicable Guidelines range of imprisonment—all of [redacted]'s co-defendants who have been sentenced thus far were similarly situated. Like [redacted], they were low-level members of the DTO who worked as Pitchers, Lookouts, or Doormen. (PSR ¶ 14.) In the context of the other sentences in this case—indeed, even absent that context—a sentence greater than the time [redacted] has already served would be significantly more than necessary to satisfy the purposes of sentencing.

We respectfully submit that [redacted] has been adequately punished, and that a non-custodial sentence would promote respect for the law. [redacted] will have been incarcerated for nearly 34 months at the time of his sentencing from the date he was transferred to federal custody on September 12, 2018. (PSR ¶ 51.) He has had ample time to consider his crimes and attempt to make amends through cooperation. A sentence of time served would be more than sufficient to punish [redacted].

Furthermore, a reduced sentence would reinforce that defendants in similar situations who assist the Government are doing the right thing, helping society, and contributing their small part to the justice system. A non-Guidelines sentence of time served would make an emphatic statement that Government cooperators cannot be intimidated and will be rewarded for their extraordinary assistance in cases like these in which their lives are threatened.

[redacted] has no appetite whatsoever for committing the same or similar acts again. In fact, he has renounced his criminal past and has displayed admirable courage and true bravery in continuing to cooperate despite personal risk to himself. His conscientious and diligent approach to his cooperation provided valuable assistance to the Government in this matter and a second, unrelated investigation.

[redacted]'s cooperation with, and assistance to, law enforcement do not erase his crimes. Nevertheless, they do demonstrate the deep remorse he feels for his offenses and the lengths to which he has gone to make up for them. In *United States* v. *Fernandez*, 443 F.3d 19 (2d Cir. 2006), the Second Circuit observed that the sentencing evaluation under 18 U.S.C. § 3553(a) "includes the history of a defendant's cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation." *Id.* at 33. [redacted]'s cooperation demonstrates both remorse and rehabilitation. Moreover, he has friends and family who have vouched for him. A custodial sentence for [redacted] would serve only to deprive a young daughter of her father and ailing, aged parents who have not been able to visit him. "It is my biggest fear that my parents who live in another country and are both aging, fragile and not healthy do not get the opportunity to spend time with [redacted]." (Ex. B.)

[redacted] has made a break from his past, and he needs to move forward with his life. Because of these facts—and because of the significant price he has paid thus far—we respectfully request that the Court consider [redacted]'s extraordinary cooperation under Section 3553(a) and impose a sentence of time served, pursuant to 18 U.S.C. §§ 3553(a) & (e). Anything more would be "greater than necessary" to achieve the purposes of sentencing.

CONCLUSION

As an adult, [redacted] strayed from the stable family life that he had during his youth. He recognizes and acknowledges his mistakes, and stands ready to accept his punishment. But his punishment should serve the purposes of sentencing, and not adhere to a Guidelines range (and a Criminal History Category) that is both unanticipated by the parties and demonstrably unfair on the facts of this case. Accordingly, for the foregoing reasons, and the timely, highly valuable assistance [redacted] rendered to the Government in the investigation and prosecution of others, we respectfully ask the Court to impose a non-Guidelines sentence upon [redacted] of time served.

Applicant Details

First Name	**William**
Last Name	**Scheffer**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **1902 Fendall Avenue** City **Charlottesville** State/Territory **Virginia** Zip **22903**
Contact Phone Number	**6037244286**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**June 2013**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 20, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law and Business Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**